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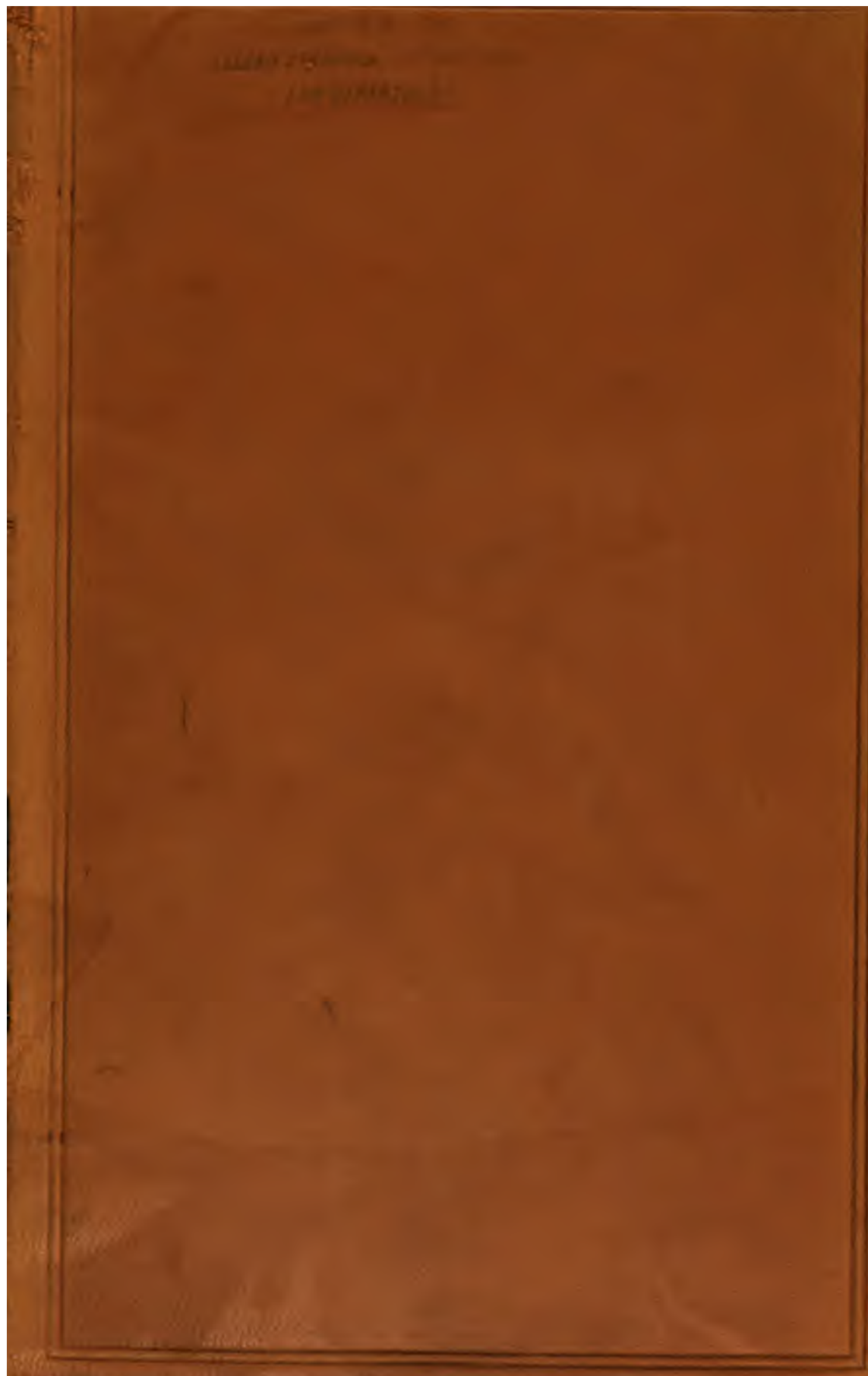
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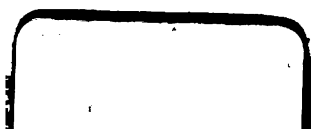
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RAILROAD REPORTS

LIGHTFOOT *v.* WINNEBAGO TRACTION CO.

(Supreme Court of Wisconsin, Jan. 10, 1905.)

[102 N. W. Rep. 30.]

Evidence—Height of Wagon.

Plaintiff, who had been driving behind a wagon loaded with wood, turned out onto the street railroad tracks, when a collision ensued with a car approaching from the opposite direction. In an action for the injuries, plaintiff's witnesses estimated the height of the wagon, but there was no evidence as to whom the wagon belonged to: *held* proper to admit on behalf of defendant the testimony of a witness who had been in the lumber business for 25 years as to the height of an ordinary wood wagon used in the city.

Remarks of Court.

A remark of the court, on overruling an objection to the question to the witness calling for the height of the ordinary wood wagon, that the fact that it was a wood wagon was the only information the jury had received, was not reversible error.

Same—Appeal—Review.

Remarks of the trial court on overruling an objection to testimony are not subject to review on appeal unless excepted to.

Collision between Street Car and Wagon—Proximate Cause.

In an action for injuries sustained by plaintiff in a collision between her vehicle and one of defendant's street cars, evidence *held* sufficient to sustain a finding that negligence of defendant was not the proximate cause of the injury.

Same—Reckless Conduct in Emergency—Danger Created by Plaintiff.*

In an action for injuries to plaintiff in a collision between her vehicle and one of defendant's street cars, an instruction requested by plaintiff as to the reckless conduct of a person in the face of "unexpected and deadly danger" was properly refused; there being evidence that the danger was created by plaintiff herself.

Same—Care Required of Traveler at Street Railway Crossing.

In an action for injuries to plaintiff in a collision with a street car, the court charged that a traveler desiring to cross the street car track has not the same right to require the speed of the car to be slackened as the person in charge of the car has to require him to give way; that it was the duty of a traveler to look and listen for a car, and as much his duty to see an approaching car in plain sight, and in dangerous proximity to the crossing, and not to get in the way of it negligently, as to look for it; and that testimony of a person that when approaching a track he looked along it for a car, and did not see it, al-

*As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-note appended to *Anniston Electric & Gas Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas. N. S., 312.

As to the duty to stop, look and listen before crossing street railway tracks, see foot-note appended to *Itzkowitz v. Boston Elevated Ry. Co.* (Mass.), 12 R. R. R. 583, 35 Am. & Eng. R. Cas., N. S., 583.

Mutual rights and liabilities of street railways and other users of streets, see foot-note appended to *Louisville Ry. Co. v. Colston* (Ky.), 12 R. R. R. 668, 35 Am. & Eng. R. Cas., N. S., 668.

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though one was in plain sight, was inconsistent with reasonable probabilities: *held*, that such instructions were not erroneous.

Imputed Negligence.†

The driver of a private conveyance in the agent of the person in such conveyance, so that the driver's negligence contributing to an injury to the other precludes any recovery.

Appeal from Circuit Court, Winnebago County; Geo. W. Burnell, Judge.

Action by Elva E. Lightfoot against the Winnebago Traction Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is an action to recover damages for personal injury sustained by the plaintiff about 3 o'clock in the afternoon of September 23, 1902, while riding in a single carriage, drawn by one horse, driven by her companion, by reason of coming in collision with one of the defendant's street cars. It appears and is undisputed that Main street runs north and south in Oshkosh; that the defendant's track is in that street at the place of collision, and for at least one block north and one block south of the same; that Washington street intersects with, and runs east from, Main street, and at right angles with it; that Algoma street intersects with, and runs northwest from, Main street; that the center of Algoma street is 25 or 30 feet north of the center of Washington street, at their respective intersections; that the particular locality of such intersections was the most traveled of any in the city, and was paved with vitrified brick, which caused much noise as vehicles passed over the same; that Main street north of such intersections was narrower than south of it; that at the time in question the plaintiff, with her companion, was driving north on the east side of Main street, toward such intersections; that, upon reaching a point at or near the northwest corner of Washington street, they started west across the defendant's track towards Algoma street; that while in the act of crossing the defendant's track they were struck by one of the defendant's cars coming from the north, and the plaintiff was badly injured. The answer was a general denial, and allegations of contributory negligence on the part of the plaintiff and the driver. There is evidence on the part of the plaintiff tending to prove that at the time they started to go across the track the streets at such intersections were full of teams, and that there was a wagon loaded with wood ahead of them, so high as to obstruct their view of the coming car. Issue being joined, and trial had, the jury, at the close of the trial, returned a special verdict wherein it was found (1) that the plaintiff was injured at the time and place alleged in the complaint; (2) that the defendant, through its employees, was guilty of a want of ordi-

†See foot-note appended to *Duval v. Atlantic Coast Line R. Co.* (N. Car.), 11 R. R. R. 235, 34 Am. & Eng. R. Cas., N. S., 235.

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nary care and prudence in the operation of said car at the time of the accident; (3) that such want of ordinary care and prudence on the part of the defendant was not the proximate cause of the plaintiff's injury; (4) that the gong was sounded on approaching the intersection of Main and Washington streets; (5) that the motorman tried to stop the car as soon as it became apparent to him that there would be a collision; (6) that the car was running, when it struck the buggy, 8½ miles per hour; (7) that the want of ordinary care and prudence on the part of the plaintiff, or the driver of the wagon in which the plaintiff was riding, contributed to produce the injury; (8) that they assessed the plaintiff's damages at \$2,000. From the judgment entered upon such verdict for \$106.55 costs, and disbursements as taxed, the plaintiff brings this appeal.

Eaton & Eaton, for appellant.

Weed & Hollister, for respondent.

CASSODAY, C. J. (after stating the facts). The verdict seems to be supported by evidence. The question for consideration is whether there was any reversible error upon the trial.

One of the questions in controversy was whether there was contributory negligence on the part of the plaintiff, in failing to see the coming car in time to avoid driving onto the track immediately in front of it. The evidence on the part of the plaintiff tended to prove that as she and her companion moved north on the east side of Main street, toward the place of collision, as stated, they drove immediately behind a large wood wagon loaded with pine wood, from 6 to 8 feet high and from 6 to 7 feet wide; that they did not know whose wagon it was, nor who was driving the team. One of the plaintiff's witnesses testified that he thought the wood wagon "belonged to some manufacturing establishment" in Oshkosh; and another, that he should judge that such wood wagon was at the time loaded with pinewood slabs, such as were got out by the Paine Lumber Company of Oshkosh; that he thought the wagon was 16 feet long; that he "should judge it was the ordinary wood wagon used * * * on the streets by millmen delivering wood" in Oshkosh. In view of such testimony on the part of the plaintiff, we perceive no error in allowing the witness E. C. Owens, on the part of the defendant, to testify that he had lived in Oshkosh 35 years, and had been engaged in the business of manufacturing sash, doors, and blinds for 25 years, and was familiar with the wood wagons used by the millmen in Oshkosh; that he had measured such wagons to find out their height; that such wagons in use by his company (McMillen Co.), and such as were in usual use, were five feet high; that that company "used in their business wood wagons such as are commonly and ordinarily in use among millmen in the city of

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Oshkosh for delivering wood"; and that the highest of those wagons were 5 feet and 4 inches high, measuring from the ground to the top of the load, and about 5 feet wide; that such wagons were about the same as those used by the different manufacturers; that the loads driven by Paine Lumber Company, he should think, would be 6 or 7 feet high; and that he supposed that the wood wagons of Morgan Company were about the same as those used by the McMillen Company. The owner of the wagon and the driver of the team were both unknown to the plaintiff and her companion. As appears, the plaintiff's witnesses had only given estimates as to the height of the wagon. The defendant had no way of identifying the particular wood wagon in question. The best evidence the defendant could give, under the circumstances, was as to the height of an ordinary wood wagon in common use in Oshkosh. Such seems to have been the view of the testimony taken by the trial court in allowing the defendant to show what was the height of an ordinary wood wagon, and stating that such was the only information the jury had got from the testimony that it was such wood wagon. Counsel seem to think that the plaintiff was prejudiced by such remarks of the court on overruling the objection to the question calling for the height of such wood wagon by actual measurement. True, the court might have used more guarded language, but we fail to perceive any reversible error in such remarks of the court. Besides, it was only the objection to the testimony that was overruled, and to which exception was taken. No exception was taken to the language of the court in ruling upon the question. It is hardly necessary to say that the case differs widely from the recent case in this court cited by counsel—*Boyce v. Wilbur Lumber Co.*, 119 Wis. 642, 645, 97 N. W. 563.

2. Error is assigned because the court refused to change the answer of the jury to the third question submitted from "No" to "Yes." This is the important question in the case, as here presented. By the second question the jury had found that the defendant was guilty of negligence in the operation of the car at the time of the accident; and by the third question, that such negligence was not the proximate cause of the plaintiff's injury. The question was peculiarly one of fact for the jury. The argument of counsel seems to be that the finding of the jury upon that question is only supported by the testimony of Owens, already mentioned, and that such testimony was incompetent, and should have been stricken out, as requested by the plaintiff. But as indicated, such testimony was competent. Besides, there was other testimony tending to sustain the third finding of the jury. Several witnesses testified that the gong was being sounded as the car approached the crossing. The motor-man on the car testified that as he came down the street he saw the wagon close to the track, and the horse and buggy,

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with the ladies in it, behind; and that they turned their horse and got onto the track 7 or 8 feet in front of the car. A passenger on the car testified that he noticed the wagon loaded with wood in front of the carriage, and that the horse and carriage, back of the wagon, turned north, and the horse came upon the track about 10 feet ahead of the car. There is other evidence tending to prove that the ladies could have seen the approaching car before turning onto the track. Of course, if those on the car could, as they approached the crossing, see the ladies in the buggy notwithstanding the wood wagon, then the ladies could have seen the approaching car. We must hold that the evidence was sufficient to sustain the third finding of the jury.

3. It is claimed that the court committed numerous errors in charging the jury. Thirty exceptions have been taken to the charge. Such multiplicity of exceptions tends to weaken confidence in any particular exception. Only two of such exceptions relate to proximate cause. We perceive no error in either of them, and, as neither is mentioned in the brief of counsel, we assume they are not relied on. The only request of the plaintiff to charge upon that question, or any other, consisted in stating the requisite conduct of a person "in the face of unexpected and deadly danger," and was clearly not applicable to a case where there is evidence tending to prove that such danger was created by the person in question. We find no error in submitting the question of proximate cause.

4. Ten of such exceptions relate to the question whether the defendant was guilty of negligence in operating the car. On that question the court charged the jury that the burden of proof was on the plaintiff, and the jury found that the defendant was guilty of such negligence. The jury having found in favor of the plaintiff on that question, it is obvious that no portion of the charge prejudiced the plaintiff as to the determination of that question. The court charged the jury on that question, however, not only as to the duties and obligations of the defendant and its motorman in operating the car, but also as to the rights, privileges, and expectation of the defendant and its motorman in so operating the car. In order that the jury might properly determine that question, the court also charged the jury as to the duties and obligations of those traveling on foot or in vehicles in streets where such cars were operated, and, among other things, that both parties were bound to use ordinary care and prudence under all the circumstances to prevent collision. Error is assigned because the court charged the jury that: "A traveler upon a street crossing, desiring to cross the street car track there situated, has not the same right to require the speed of a car to be slackened, to enable him to pass over the track, as the person in charge of the car has to require him to give way to allow the car to pass." And then, after stating that

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it was the duty of a traveler about to cross a street car track "to look and listen for a coming car, and to perform that duty when and where he will have reasonable opportunity to render his efforts in that regard effective," the court further charged the jury, that: "It is as much his duty, as a matter of law, to see an approaching car which is in plain sight and in dangerous proximity to the crossing, and not to negligently place himself in the way of it, as it is to look for the car. Testimony of a person or any number of persons that he or they, when approaching a street car track with a view of crossing it, looked along the track for a coming car, and did not see one, although a car was in plain sight, and so near the point of observation as to render an attempt to cross the track in front of it dangerous, is inconsistent with all reasonable probabilities." The manifest purpose of such instructions was to inform the jury that the defendant was only responsible for the misconduct of its motorman, and not for the misconduct of others over whom it had no control.

5. Error is assigned because the court further charged the jury upon the same question to the effect that, if the driver of the vehicle in question was guilty of any want of ordinary care and prudence at the time in question, then the law imputes such negligence to the plaintiff, who was riding with her. In support of such contention counsel cites numerous adjudications, both English and American. But this court held, 27 years ago, in an opinion by Chief Justice Ryan, that "the driver of a private conveyance is the agent of the person in such conveyance, so that his negligence, contributing to the injury complained of by such person, * * * will defeat the action." *Prideaux v. City of Mineral Point*, 43 Wis. 513, 526-531, 28 Am. Rep. 558. Such ruling has been steadily adhered to during these many intervening years. *Otis v. Town of Janesville*, 47 Wis. 422, 2 N. W. 783; *Ritger v. City of Milwaukee*, 99 Wis. 190, 197, 74 N. W. 815; *Olson v. Town of Luck*, 103 Wis. 33, 35, 79 N. W. 29. If the rule contended for is to prevail, it is for the Legislature to say so.

6. Five exceptions have been taken to the portion of the charge in submitting the seventh question to the jury in respect to contributory negligence. Such portions of the charge were in line with those already considered. On that question the jury were told that the burden of proof was on the defendant. Counsel contend that, under the charge of the court and the wording of that question, it is impossible to tell whether 12 jurymen concurred in finding the plaintiff or the driver guilty of contributory negligence. See *Lowe v. Ring* (Wis.; officially unreported) 101 N. W. 698. But the view we have taken of the case makes it unnecessary to consider that question, or any of the exceptions taken to such portions of the charge, since the jury found that the defend-

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ant's negligence was not the proximate cause of the plaintiff's injury.

Other exceptions are without sufficient merit to call for consideration. We find no reversible error in the record. The judgment of the circuit court is affirmed.

RHYMES v. JACKSON ELECTRIC RY., LIGHT & POWER CO.

(Supreme Court of Mississippi, Jan. 16, 1905.)

[37 So. Rep. 708.]

Directing Verdict—Scope of Review.

On review of a decision of the court directing a verdict for defendant at the close of plaintiff's evidence, the question to be determined is whether the court would set aside a verdict for plaintiff on the evidence.

Collision between Street Car and Person near Track—Gross Negligence and Contributory Negligence.*

A motorman who allows his car to run down a sharp grade, past a number of persons engaged in picking up packages on the edge of the track, at the place of a recent accident, with no control of the car, and without sounding an alarm, is guilty of such gross negligence as to justify a verdict for injuries to one of the persons so engaged, though the latter may be guilty of contributory negligence.

Appeal from Circuit Court, Hinds County; D. M. Miller, Judge.

Action for personal injuries by G. W. Rhymes against the Jackson Electric Railway, Light & Power Company. From a judgment for defendant, plaintiff appeals. Reversed.

Harris, Powell & Harris, for appellant.
Williamson & Wells, for appellee.

CALHOON, J. In this case, which is an action for damages for personal injuries from being struck by a street car of the appellee company, no evidence was offered by the company, but the court sustained its motion to exclude the evidence introduced for the plaintiff, and for a peremptory instruction to the jury to find for the defendant. In this situation, the question is whether the court would or should have set aside a verdict if found for the plaintiff on the testimony offered for him.

The case shown is that the delivery wagon of an express company had cast a wheel, and was broken down and turned over on its side on the street car track, and the horses had

*As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-note appended to *Annis-ton Elec. & Gas Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312.

As to the mutual rights and duties of street railways and other users of streets, see foot-notes appended to *Louisville Ry. Co. v. Colston* (Ky.), 12 R. R. R. 668, 35 Am. & Eng. R. Cas., N. S., 668.

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run away. Express packages were scattered around, and the safe for valuable packages was sent across the street to a store for safety. A considerable crowd collected at the scene of the accident, one of whom was Rhymes—a citizen not connected with the express company or the street car company. He, with others, immediately proceeded to right up the wagon, get it off the track, and pick up and put back in it the scattered packages. While they were so engaged, the horses had been caught and rehitched to the wagon. The rear end of the wagon was north of the track, and but three feet from the street car track, and into this rear end Rhymes and one Proctor had just put the last package—a large crate of hats—when they were asked to go across the street to the store for the safe, which was south of the track. Rhymes turned to do so, and, as he turned, was struck by the part of the car jutting over the track, and dragged some distance. He does not think he made a step, but may have made one. He could have seen the car if he had looked. The scene was in a broad street, and the car track was in its center, with a straight view for 100 yards. The car was running west, and down a steep grade, moving from eight to ten miles an hour; and the motorman was not looking down his track, but at the crowd along its edges, did not have his hand on his brake, according to custom, did not slow up or sound any alarm, and said at the time, "My old brakes ain't any account."

Under this presentation of facts, we think the case should have been left to the jury to determine whether, with his preoccupation and his surroundings, he was guilty of contributory negligence, and, if he was, whether the motorman was not guilty of such gross negligence as to make recovery by the plaintiff proper.

The degree of care required of motormen of electric cars varies with varying situations and circumstances, and what would be slight or no negligence in some conditions might well be regarded as gross in others. Running down a sharp grade, in the daytime, with the unusual spectacle of a throng of preoccupied people on the edge of the track at the scene of a recent accident, with no control of the car, and without sounding an alarm, would be gross negligence, and such as would justify a verdict for damages notwithstanding the act of the plaintiff. He shows such a case by his witnesses, and, unless it is varied by evidence for the company, it warrants the jury in a verdict for plaintiff.

Montgomery v. Lansing, etc. (Mich.) 61 N. W. 543, 29 L. R. A. 287, cited by counsel, is precisely in point, and we approve and follow it. *Thompson v. Salt Lake, etc.* (Utah) 52 Pac. 92, 40 L. R. A. 172, 67 Am. St. Rep. 621.

Reversed and remanded.

ALABAMA GREAT SOUTHERN R. CO. v. BALDWIN.

(Supreme Court of Tennessee, Oct. 12, 1904.)

[82 S. W. Rep. 487.]

Vice Principal—Conductor.*

A conductor of a railway train is the vice principal of the company, and it is liable for his negligence when acting in his official capacity.

Same—Same—Signaling for Coupling.

Where the conductor of a freight train signaled the engineer to back a portion of the train to make a coupling, at a time when a brakeman was between the two portions of the train preparing the cars for coupling, the conductor was acting in his official capacity as vice principal of the railroad company, and not merely as a fellow servant of the brakeman.

Error to Circuit Court, Hamilton County; M. M. Allison, Judge.

Action by L. Baldwin against the Alabama Great Southern Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Shepherd & Frierson, for plaintiff in error.

Smith & Carswell, for defendant in error.

SHIELDS, J. The defendant in error, L. Baldwin, a brakeman in the employ of the plaintiff in error, while attempting to make a coupling in the operation of one of its trains, through the negligence of Edgar Fuller, conductor in charge of the train in prematurely signaling the engineer to back his engine and a car attached for the purpose of making a coupling, had his arm caught between the bumpers of the cars to be coupled, and crushed, and brought this suit to recover the damages sustained by him, and recovered judgment.

The contention of the plaintiff in error is that Edgar Fuller, when he signaled the engineer, was not acting in his official capacity as conductor, but as a fellow servant of the defendant in error, and that it is not responsible for the negligence of which he was guilty while so acting.

There is no controversy as to how the injury was sustained. The conductor and his crew were engaged in making up a freight train, and were attempting to couple a car attached to the engine to one on the side track; both of the cars being equipped with automatic couplers. The first effort failed, and another was being made when the injury was inflicted. The declaration correctly states the facts in relation to the last effort to make the coupling in these words:

"Plaintiff in the discharge of his duty thereupon went in between said cars which were then standing still, one coupled to the engine, and proceeded to adjust the said coupling by opening the 'knuckle' thereof, and to otherwise set the two

*See note at end of case.

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drawheads so that the two cars might be properly coupled. While the plaintiff was standing in between the two said cars, entirely out of sight of the engine, and while he was endeavoring to adjust the said couplings in a proper manner, acting in a careful manner, and in the proper discharge of his duties, the defendant's conductor, Edgar Fuller, then and there the immediate superior of plaintiff, carelessly, negligently, and wrongfully signaled to the engineer to shove up the car which was attached to the engine upon and against the car to which it was to be coupled, although the said conductor knew, or by the exercise of ordinary care should have known, that the plaintiff had not adjusted said drawheads and was not ready for said coupling to be made. The engineer, upon receiving said signal from the said conductor, thereupon pushed on said car, as it was his duty to do in response to said signal, and the plaintiff's hand and arm was then and there caught in between the drawheads, dead-woods, bumpers, or ends of said two cars, and was crushed and mangled in and between said drawheads."

It also appears in evidence that the defendant in error could have given the signal to the engineer to back the engine and car or to another brakeman to be repeated to the engineer, or to the conductor, for that purpose, and the engineer would have obeyed it. In other words, the order to the engineer to move his train backward or forward in making a coupling does not necessarily have to be given by the conductor, but may be given by a brakeman making the coupling; but the conductor may take immediate charge and direction of the matter, and give all necessary signals and orders, which Conductor Fuller did on this occasion.

The conductor of a train is the superior in authority and grade in every train crew, and has charge of the train and its operations, and all the other members of the a crew are under his control and subject to his orders, which they must obey, regardless of whether they concur in the necessity or propriety of them. He is the representative of the company, and is vested with all of its authority over the train and its crew in the work being done, and charged with all the duties and responsibilities which the company owes to its employees, engaged in this perhaps the most hazardous of all industrial pursuits, chief of which is the duty to carefully and skillfully superintend the movements of its cars and trains for the prevention of accidents, upon the proper discharge of which the safety of the employees is so greatly dependent. He is a vice principal of the company, and it is liable for his negligence when acting in his official capacity. *Railroad Co. v. Spence*, 93 Tenn. 181, 182, 23 S. W. 211, 42 Am. St. Rep. 907; *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787.

This is conceded by the plaintiff in error to be the general

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rule, but it insists that a vice principal may act in a dual capacity; that is, he may lay aside his official or representative character, and engage in the common service with the employees who are under him and subject to his orders, and when he does so he is a fellow servant only, and any negligence of which he may be guilty while so acting is personal, and that of a fellow servant, for which the employer is not liable, and that in this case the order or signal to the engineer to move his engine backward, being one which could have been given by a brakeman, was of this character. The cases of *Allen v. Goodwin*, 92 Tenn. 386, 21 S. W. 760; *Railroad v. Bolton*, 99 Tenn. 274, 41 S. W. 442; and *Gann v. Railroad Co.*, 101 Tenn. 380, 47 S. W. 493, 70 Am. St. Rep. 687, are cited to sustain this contention.

The rule in this state, as held in these cases, unquestionably is that a vice principal may at times lay aside his official character and engage in the common service of the other servants of the employer over which he has control, and that his acts and negligence, while thus engaged, are those of a fellow servant, for which the employer is not ordinarily responsible; but he cannot act in both capacities at the same time and, in order to exonerate the employer, the service or act in performance of which he is engaged must be strictly that of a fellow servant, and not one which it is his duty to do, or which he may do, as a superior or vice principal. The cases in which the doctrine has been applied by this court are where the vice principal was, at the time the injury was inflicted through his negligence, engaged solely in the work of service of a common employee.

In all those above cited, the vice principal was performing manual labor along with the other employees. In *Allen v. Goodwin* the negligence complained of was that of a foreman, working upon a building in a position above the plaintiff, in dropping a piece of pipe upon him.

In *Railroad v. Bolton* a section boss negligently injured one of the section men under him while he was personally assisting him in lifting and unloading some heavy timbers; and in *Gann v. Railroad Co.* the action was sought to be maintained on account of the negligence of the section boss in operating the brake upon a hand car, which was the work of the section men under him, whereby the car was thrown from the track and one of the men injured.

In none of these cases, or any other to which we have been cited, was the injury the result of a negligent order or direction given by a superior servant.

The vice principal cannot act in the capacity of superior and fellow servant at one and the same time, and, if the act is one which he could do in either capacity, it will be held to have been done in the capacity in which it is his special duty to act; but the nature of the act may also be considered in determining the character in which he was acting.

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The giving of orders, and a signal, is as much an order as if spoken, is essentially the province of the master or his representative, and when given by them to a servant, or one under their control, it will be presumed to be made in the capacity of master, and must be obeyed.

The fact that the engineer would have obeyed the signal, if given by the brakeman, is immaterial, since the order was in fact given by his superior in the line of his authority, and he had no discretion but to obey it. There seems to be no conflict in the authorities upon this subject. In the late work of Mr. Labatt on Master and Servant, it is said:

"The logical consequence, if not the actual effect, of some decisions referred to in section 544, *supra*, is to absolve the master even from the result of complying with the negligent order of a vice principal, where such order relates merely to the details of the work. But there is an overwhelming weight of authority to sustain the doctrine that the liability to which the master is declared to be subject, wherever 'the negligent act is the direct result of the exercise of power conferred by the master, in the performance of a duty devolving by law upon him,' is predicable in the case of orders issued in respect to the work, whatever may be the precise object to which those orders may have relation. It is, in fact, difficult to see what more indisputable example there can be of an exercise of authority than the giving of such orders, and for the purpose of affecting the master with liability in this instance it is obviously quite immaterial whether the delinquent employee be a mere superior servant or a general or departmental manager. According to the great majority of the case, therefore, all that is necessary to fix liability upon master is that the negligent order which caused the injury should be proved to be incident to the performance of the duties of his position.

"The order may be a negligent one because the servant is directed to use dangerously defective appliances, or to work in an abnormally dangerous place, or to work in a dangerous manner, or to do something which, under the circumstances, will render the place of work abnormally dangerous for a fellow servant."

The author cites numerous cases, which, so far as we have access to them, seem to fully sustain the text.

In the case of *Hoke v. Railroad*, 88 Mo. 360, it is said:

"Where a roadmaster of a railroad, having general superintendence of its tracks, while engaged in superintending and directing the removal of a wreck, gives a wrong signal to the engineer of a train assisting in removing the wreck, whereby a laborer engaged in the work of removal is injured, the railroad is liable therefor.

"The roadmaster was not a fellow servant of the one injured in the transaction in which the injury was received, but represents the company therein as vice principal, or alter

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ego, and his negligence in the matter, causing the injury, was that of the company. * * *

"In the case at bar, as has been seen, Tracy, whose negligence and carelessness in giving signals to the engineer occasioned the injury in question, was not at the time engaged or assisting in the manual work of removing said wreck from the roadbed and track of defendant, or in loading said wrecked car upon said wrecking train, but was engaged as such in superintending, directing, and controlling said laborers, including plaintiff, in said wreck, and in that particular was in the line of his duty; and the road was liable."

And in a recent case decided by the Supreme Court of Georgia, where the facts were almost the same as those in the case at bar, it was held:

"It was complained that the trial judge, in his charge to the jury, erred in assuming that the conductor was the alter ego of the defendants on the occasion in question, thereby excluding the theory of the defendant that they were fellow servants, and that the company was therefore not liable for any injury resulting for the negligence of the conductor. Ordinarily the conductor of a train has control of its movements, and brakemen connected with the train are, while engaged in coupling cars to the train at stations, subject to his orders and under his control; and he is not, when directing the movements of the train and giving orders to the brakeman and engineer in connection therewith, a fellow servant of such employees, within the meaning of the rule as to fellow servants, but is a vice principal to the master. See *Mills v. E. Tennessee Ry. Co.*, 87 Ga. 105 [13 S. E. 205]; *Prather v. Richmond & Danville R. R. Co.*, 80 Ga. 436 [9 S. E. 530, 12 Am. St. Rep. 263], and cases cited." *Spencer, Receiver, v. Brooks*, 97 Ga. 681, 25 S. E. 480.

The Supreme Court of Massachusetts, in the case of *Devine v. Railroad*, 159 Mass. 351, 34 N. E. 539, where the plaintiff was injured by the negligence of the conductor in improperly signaling the engineer to move back some cars, said:

"He [the conductor] gave the stop motion, as he himself testified, to the first three cars that were detached from the train. He also testified that he gave the kick motion for the two that struck the bunting post; but he does not seem to remember whether he gave the stop motion for them that morning or not. Nobody appears to remember who gave the stop motion that morning for these two cars. It appears from the testimony of the engineer and conductor that the stop motion was usually given by the conductor. It also appears from the testimony of the conductor that, when the two cars were kicked onto the stub track, he stood at the switch. It is not reasonable to suppose that that was a place from which the stop motion could be easily given. It is said

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that the switchman sometimes gave the motion, but ordinarily he would not give it with the conductor at the switch. And the road was held liable for the negligent signal, although, as seen, the switchman also had authority to give the signal."

The same rule has been announced and applied in the cases of *Walker v. Gillett*, 59 Kan. 214, 52 Pac. 442; *Purcell v. Railroad*, 119 N. C. 728-738, 26 S. E. 161; *Railroad Co. v. Williams*, 86 Va. 165, 9 S. E. 990, 19 Am. St. Rep. 876; *Cole Bros. v. Wood*, 11 Ind. App. 37, 36 N. E. 1074; and *Clark v. Hughes*, 51 Neb. 780, 71 N. W. 776.

We are therefore of the opinion that there is evidence of negligence upon the part of the railroad company to sustain this verdict, and the assignment of error to the contrary, and under which this question is made, is overruled, and the judgment of the circuit court affirmed.

NOTE.

FELLOW SERVANTS—CONDUCTOR AND MEMBERS OF HIS TRAIN CREW.

There is probably no class of negligence cases in which there exists less harmony in the decisions than that of fellow service. And a student of this branch of the law, after classifying cases and satisfying himself by apparently unassailable reasons as to the principles applicable to each class, need not be surprised to find his views opposed by the most respectable authority. This being the case, we have thought it best to arrange the authorities in this note according to their respective states.

ENGLAND.**Members of Train Crew.**

In *Tunney v. Midland R. Co. (Eng.)*, L. R., 1 C. P. 291, it is held that a conductor is a fellow servant of the members of his train crew.

UNITED STATES.

According to the latest decision of the supreme court of the United States on the question, a conductor of a train, having only the ordinary duties and authority of such position, is a fellow servant of the members of his train crew. However, the court is not unanimous in supporting this view. See dissenting opinion in *New England R. Co. v. Conroy (U. S.)*, 16 Am. & Eng. R. Cas., N. S., 380.

Death of Brakeman—Negligence of Conductor in Supervising Movements of Train.

In *New England R. Co. v. Conroy (U. S.)*, 16 Am. & Eng. R. Cas., N. S., 380, an action for the death of the head brakeman of a freight train caused by the parting of the train and a collision between the sections, the negligence complained of consisted in the alleged failure of the conductor in control of the trainmen and in charge of the train to properly supervise its movements, and the fact that he, in the full knowledge that the other brakemen were in the caboose, failed to order them to their brakes, by applying which they might have prevented the accident. It was held that, in the absence of evidence of special and unusual powers having been conferred upon such conductor, his relation to the deceased brakeman must be deemed to have been not that of a vice principal, but that of a fellow servant, within the meaning of the rule which exempts

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a railroad from liability for injuries to one of its employees caused by the negligence of another employee.

Engineer Acting as Conductor—Fellow Servant of Fireman.

The engineer and fireman of a locomotive engine, running alone on a railroad and without any train attached, are fellow servants, although a rule of the company provides that when there is no conductor, the engineer shall be regarded as a conductor. So held in *B. & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914. In this case it is said in the opinion: "Counsel for defendant in error rely principally upon the case of *Railroad Co. v. Ross*, 112 U. S. 377, taken in connection with this portion of rule No. 10 of the company: "Whenever a train or engine is run without a conductor, the engineman thereof will also be regarded as conductor, and will act accordingly." * * * The argument is a short one: The conductor of a train represents the company, and is not a fellow-servant with his subordinates on the train. The rule of the company provides that when there is no conductor, the engineer shall be regarded as a conductor. Therefore, in such case he represents the company, and is likewise not a fellow servant with his subordinates. But this gives a potency to the rule of the company which it does not possess. The inquiry must always be directed to the real powers and duties of the official and not simply to the name given to the office. The regulations of a company cannot make the conductor a fellow servant with his subordinate, and thus overrule the law announced in the *Ross* case. Neither can it, by calling some one else a conductor, bring a case within the scope of the rule there laid down. In other words, the law is not shifted backwards and forwards by the mere regulations of the company, but applies generally irrespectively of all such regulations. There is a principal underlying the decision in that case, and the question always is as to the applicability of that principle to the given state of facts."

Dissenting Opinion in *Baugh* Case.

In *B. & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, Mr. Justice Field, dissenting, says: "The engineer was thus (by such rule) invested from that time with the powers and duties of a conductor. He could then control the movements of the locomotive, and, in the absence of special orders, direct when it should start on its return to Bellaire, the places where it should stop, and the speed with which it should proceed. The position that the company could not alter its relations to the engineer and those under his direction by such appointment does not rest upon any tenable ground. There certainly is no substantial reason why the company may not at any time constitute one of its employees a conductor of an engine or train. It is a matter resting in its discretion to appoint a conductor or to remove him from that position at any time. The duties and liabilities of the officer and his relations to the company depend upon the nature of the office which he at the time holds, not upon his duties and relations in a previously existing employment. If the corporation acting by its directors, either by special designation or by established rule, appoint a person as conductor, generally or for a limited time, he takes the duties and incurs the responsibilities of the appointment from that date. The person previously a subordinate or coemployee becomes thereby the superior of the fellow laborer in his powers and changed in his relations to the company. To say that he continues in his previous subordination and relationship to the company would be like stating that a common soldier taken from the ranks and put in command of a company or regiment of which he was a member still retains his subordinate relations to his former fellow soldiers and to the commander in chief. To hold that an engineer in the position placed by the rule of the company did not become a conductor in fact is refusing to give effect to the express terms of the rule. It is declaring that he shall not be what the established rule of the company

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declares he shall be. I do not think this position can be maintained."

Injury to Conductor—Negligence of Engineer Acting as Conductor of Section of Train.

In *Newport News & M. V. Co. v. Howe* (C. C. A.), 52 Fed. Rep. 362, it is held that a brakeman who is sent by a conductor from the rear portion of a parted train to signal the forward portion, of which the engineer is, by the rules of the company, the conductor, is a fellow servant of the engineer, and cannot recover from the company for an injury caused by the engineer's negligence.

Brakeman—Employees' Liability Act.

In *Northern Pac. R. Co. v. Hogan* (C. C. A.), 63 Fed. Rep. 102, it is held that a brakeman and a conductor are fellow servants, within the meaning Comp. Laws N. Dak. 1887, § 3753, exempting an employer from liability to an employee for the negligence of another person employed by him in the same general business.

Doctrine of Ross Case.

In *Railroad v. Ross*, 112 U. S. 377, it is held that a conductor in charge of a train is, as to those subject to his orders on the same train, a vice principal, acting for the company.

Injury to Brakeman—Control of Train and Crew—Sudden Starting of Train.

In *Canadian Pac. R. Co. v. Johnston* (C. C. A.), 61 Fed. Rep. 738, it is held that where a conductor of a freight train, under the rules of the company, has charge and control of the train and all persons employed on it, and is responsible for its movements, the railroad company is liable for injuries to a brakeman on such train caused by the negligence of the conductor in unexpectedly starting the train.

Injury to Brakeman—Failure to Obey Train Dispatcher's Orders.

In *Northern Pac. R. Co. v. Cavanaugh* (C. C. A.), 51 Fed. Rep. 517, it appeared that a brakeman sustained injuries in a collision caused by the negligence of a conductor and engineer in disobeying the train dispatcher's orders. It was held that the company was liable, as the conductor was not a fellow servant of the brakeman.

Death of Engineer—Management of Switcher.

In *Mase v. Northern Pac. R. Co.* (C. C.), 57 Fed. Rep. 283, it is held that where the rules of a railroad company impose upon its conductors the care and management of switches used by them, and charge them with the responsibility of their proper handling and position while in such use, such power is delegated by the rules as to render a conductor, with respect to such switches, a vice principal, so as to charge his company with liability for the death of an engineer killed by reason of his engine running into an occupied side track, through a switch negligently left open and unguarded by the conductor of another train.

Doctrine of Ross Case Repudiated.

New England R. Co. v. Conroy (U. S.), 16 Am. & Eng. R. Cas., N. S., 380, practically repudiates the doctrine of the *Ross Case*, the court, through Mr. Justice Shiras, saying in reference to the *Ross Case*: "While the opinion in the *Ross Case* contains a lucid exposition of the established rules regulating the relations between masters and servants, and particularly as respects the duties of railroad companies to their various employees, we think it went too far in holding that a conductor of a freight train is, ipso facto, a vice principal of the company. An inspection of the opinion shows that conclusion was based upon certain assumptions, not borne out by the evidence in the case, as to the powers and duties of conductors of freight trains."

Note

ARIZONA.

Different Department Limitation.

A section foreman on a railroad and a conductor of a work train, who are engaged under a common superior in clearing the track of a wreck are fellow servants. So held in *Southern Pac. Co. v. McGill* (Ariz.), 44 Pac. 362. In this case it is held that the master's liability does not depend upon gradations in the employment, unless the superiority of the person causing the injury was such as to make him a principal or vice principal; that the liability of the master does not depend upon the fact that the servant injured may be doing work not identical with that of the wrongdoer; that the test is, the servants must be employed in different departments, which in themselves are so distinct and separate as to preclude the probability of contract and of danger of injury by the negligent performance of the duties of the servant in the other department.

ARKANSAS.

In this jurisdiction a conductor is held to be a fellow servant of the members of his train crew. See *St. Louis Iron Mountain & Southern Ry. v. Schakelford*, 42 Ark. 417.

CALIFORNIA.

Brakemen.

In *Brown v. Central Pac. R. R. Co.*, 72 Cal. 523, 14 Pac. 138, it is held that the brakemen and conductor on the same train are fellow-servants.

Brakeman—Employers' Liability Act.

In *Congrave v. S. P. R. R. Co.*, 88 Cal. 360, 26 Pac. 175, it is held that a brakeman and conductor on the same train are persons "employed by the same employer in the same general business," within the meaning of § 1970 of the Civil Code of California; and the company is not liable for the death of one caused by the negligence of the other.

COLORADO.

Conductor Charged with Care of Switches.

In *Denver, etc., R. Co. v. Sipes*, 23 Colo. 266, 6 Am. & Eng. R. Cas., N. S., 605, it is held that a conductor charged with the responsibility of seeing that switches are properly adjusted is not a vice principal.

DELAWARE.

Injury to Conductor—Negligence of Engineer.

In *Creswell v. Wilmington & N. R. Co.* (Del.), 14 Am. & Eng. R. Cas., N. S., 625, it is held that the engineer and conductor of the same train are fellow servants. In this case it was claimed that Creswell, the conductor of the train, was injured through the negligence of its engineer. They were held to be fellow servants because of their habitual association, which caused them to exercise an influence over each other.

GEORGIA.

In this jurisdiction it seems that a conductor is a superior servant or vice principal.

Other Members of Train Crew.

In *Spencer v. Brooks* (Ga.), 5 Am. & Eng. R. Cas., N. S., 202, it is held that, as a general rule, a conductor in charge of a regular passenger train or freight train, and having full control of its movements, is not while in the performance of his usual and ordinary duties with reference thereto, a fellow servant of an engineer, fireman or brakeman, working under his orders. Under such circumstances he is a vice principal and his acts are those of the railroad company.

Note

Injury to Car Coupler—Alighting from Moving Train—Order of Conductor.

Where a conductor in charge of a train ordered a train hand under him to step from the cars while in motion, in order to couple cars standing on a side track to the main body of the train, whether or not the conductor had the right to give the order or the plaintiff was required to obey it, the former in giving the order was acting as a vice principal, and the company could not escape responsibility on account of its own wrong. So held in *Central Railroad v. DeBray*, 71 Ga. 406.

Injury to Car Coupler—Movement of Train—Engineer Acting as Conductor.

In *Taylor v. Georgia Marble Co.*, 99 Ga. 512, 27 S. E. 768, it is held that the rule that an agent or employee of a corporation who, in the discharge of his general duties, has charge of a particular branch or department of the corporation's business as to which he acts in the capacity of a vice principal, and as such has control of all the subordinate servants who are to work under him, is, as to one of these whose duty it is to obey his orders and who takes his orders from no other source, a quasi master, and not a fellow servant in the sense that the subordinate will have no right of action against the corporation for personal injuries caused, without fault on his part, by the negligence of the superior, was held applicable where a brakeman was injured, while coupling cars under the orders of the engineer, upon whom all the powers of a conductor had been conferred, through the negligence of the latter in managing the train.

ILLINOIS.

Superior-Servant Limitation.

In this jurisdiction the doctrine prevails that where injury to a servant is the result of the negligent exercise by another servant of authority over the injured employee, conferred by the master, the fellow-servant rule is not applicable to prevent recovery against the master. But this doctrine was held not applicable in the following cases.

Brakeman—Power to Employ and Discharge.

In *Illinois Cent. R. Co. v. Meyer*, 63 Ill. App. 531, it is held that a conductor and brakeman upon a freight train, having the same common master and co-operating together in the same line of employment in constant association with each other, are fellow servants. In this case it is also held that the fact that one of the number of servants is invested with power to control and direct the action of the others will not, of itself, render the master liable for the negligence of the governing servant; that in order to make a conductor a vice principal he must have the power to employ and discharge the members of his crew.

Injury to Conductor—Negligence of Trainman.

In *Chicago & N. W. Ry. Co. v. Snyder*, 117 Ill. 376, 7 N. E. 604, it is held that where a conductor of a train is killed in a collision between two trains at the intersection of two railroads, in consequence of the negligence of the station agent in giving signals when the several trains might pass with safety, no recovery can be had if the other trainmen of his train under him, his fellow servants, were guilty of negligence which contributed to his death.

Injury to Fireman—Conductor Not in Full Control of Train.

In *Meyer v. Illinois Cent. R. Co.* (Ill.), 12 Am. & Eng. R. Cas., N. S., 694, it is held that where the fireman of a train is injured through the negligence of the conductor in running the train, and the latter had not full control of the train, as defendant's principal officers would have had, or the train dispatcher had, and was required to run it according to the company's rules, and the accident did not

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occur on account of the conductor's exercise of any authority over the fireman, the negligence was that of the fireman's fellow servant.

Injury to Shoveler on Construction Train.

In *Chicago & A. R. Co. v. McDonald*, 21 Ill. App. 409, it is held that the conductor and engineer of a construction train and a shoveler employed on such train are fellow servants engaged in the same branch of service, and their common master is not liable for an injury to the shoveler through the negligence of the conductor and engineer, or either of them.

INDIANA.

In this state a conductor is a fellow servant of the other members of his train crew, though he may have higher authority than they. The view of the supreme court of the state in the following case seems to be affected by the prevalence of the different-department doctrine.

Injury to Car Coupler—Management of Train—Conductor a Servant of Higher Authority.

In *Thayer v. St. Louis, A. & T. H. R. Co.*, 22 Ind. 26, it was held that a railroad company is not liable to one of its employees for injuries occasioned by another, where both are engaged in the same undertaking, even though the injuries are the result of the negligence of an employee of higher authority, to whom the injured employee is subject, and from the consequence of whose negligence he cannot guard. This rule was held applicable where a brakeman was injured while uncoupling under the orders of the conductor. It was claimed that the company was guilty of negligence in maintaining an open culvert, into which the brakeman fell; and the company was liable to him, notwithstanding he entered into the service of the company with knowledge of the condition of the culvert, because the conductor ordered him to detach the cars at that point. But the court said: "Was it the negligence of the company in directing the detaching of cars at that place? It was not. The direction was not given at that time, pursuant to any special order of the company. The direction was given by the conductor in the discharge of his general duties, and by virtue of his general powers as conductor. He did not assume to direct the manner of executing the act. And, if, when he ordered the cars detached, he did not slacken the speed of the train, or place it in position, as he ought to have done, so the act of uncoupling could be safely performed, then the injury to the plaintiff happened through the carelessness of a coemployee of higher authority, and does not differ from *Wilson v. Madison etc., Co.*, 18 Ind. 226, *supra*."

Injury to Conductor—Negligence of Brakeman.

In *Wilson v. Madison, etc., R. R. Co.*, 18 Ind. 226, it is held that an employee whose duties are various, consisting among other things, of coupling and uncoupling trains, is, while engaged in uncoupling cars, to be regarded in the same general undertaking as the engineer and conductor having charge of the cars; and is their fellow servant, so as to exempt the company from liability for injury to a conductor resulting from the negligence of a brakeman of his train.

Injury to Brakeman.

In *Louisville, etc., R. Co. v. Southwick*, 16 Ind. App. 486, it is held that a brakeman injured through the negligence of the conductor of his train cannot recover against the company.

IOWA.

Injury to Members of Train Crew.

In *Dunlavy v. Chicago, etc., R. Co.*, 66 Iowa 435, 21 Am. & Eng. R. Cas. 542, it is held that a railroad company is not responsible for the negligence of a conductor which results in injury to a member of his train crew, as they are fellow servants.

Note

KANSAS.

Walker v. Gillett, 59 Kan. 214, 52 Pac. 442, 10 Am. & Eng. R. Cas., N. S., 140, the latest decisions of the supreme court of Kansas directly in point, supports the superior-servant limitation of the fellow-servant rule.

Injury to Brakeman—Rationale of Rule.

In *Walker v. Gillett*, 59 Kan. 214, 52 Pac. 442, 10 Am. & Eng. R. Cas., N. S., 140, it is held that at common law a conductor having full charge and control of a train is not a fellow servant of a brakeman who acts under his orders; that in such a case the conductor is the representative of the company, and the latter is responsible to the brakeman, for the conductor's negligence. In this case it is said in the opinion: "Where the general power to manage and command is given to one, and the duty of the others is merely to execute and obey, he who directs stands in the place of the principal and the principal must respond to those under him for his misconduct. This must be so, else it is impossible to see how at common law a railroad corporation can ever be responsible to any of its employees for the misconduct of any officer occupying a superior station in the same line of service; for all are servants, and the master is only an intangible corporate entity."

Contra.**Brakemen.**

As between coemployees, as a conductor and a brakeman on the same train, the negligence of either is not the negligence of the company, unless the company was negligent in employing or retaining such conductor or brakeman. So held in *Dow v. Kansas Pac. Ry. Co.*, 8 Kan. 642.

KENTUCKY.

Here the superior servant limitation prevails.

Injury to Brakeman.

The railroad company is liable for an injury to one of its employees though the negligence of another, although they may be engaged in the same common employment provided the negligent one is superior to or in control of the injured one. This rule was held applicable where a brakeman was injured through the negligence of the conductor of his train. *L. & N. R. R. Co. v. Moore*, 83 Ky. 675.

Injury to Brakeman—Collision between Sections of Train—Failure to Heed Signals.

In *Newport News & M. V. Co. v. Dentzel's Adm'r*, 91 Ky. 42, 14 S. W. 958, it appeared that in descending a grade a heavily-loaded freight train was in some way broken into two sections. The engineer, becoming apprised of the fact, put on additional steam and ran ahead with the front section to avoid a collision. He repeatedly gave the signal for a stop of the rear section, and when he finally checked the front section, supposing that those in charge of the rear section had stopped it, a collision occurred resulting in the injury of the brakeman on the front section. The brakeman on the rear section was in the caboose with the conductor, and neither paid any attention to the repeated alarms. It was held that as the conductor, in this case was a party to the neglect, and was the superior of the injured brakeman, the rule of respondeat superior applied, and the company was liable.

Employing Car Coupler.

In *Newport News & M. V. Ry. Co. v. Carroll*, 17 Ky. L. Rep. 374, 31 S. W. 132, it is held that the act of the conductor of a train in employing one to couple its cars is the act of the railroad company, and it cannot escape liability, where such person is injured while coupling cars, on the ground that the relation of master and servant did not exist between itself and the car coupler.

Note

LOUISIANA.

Although the superior-servant limitation seems to be repudiated by *Walls v. Morgans' Louisiana, etc.*, R. Co., 38 La. Ann. 156, the latest decision from the highest court of the state directly in point declares that a conductor is the representative of the company so as to render it liable for his negligence which results in injury to a member of his train crew.

Injury to Engineer—Rationale of Doctrine.

In *Van Ambury v. Vicksburg, S. & P. R. Co.*, 37 La. Ann. 650, it is held that the fellow-servant doctrine releasing a railway company from liability for injuries because the servant injured is a fellow servant of the employee through whose negligence the injury was sustained, is modified, and it is now established that a conductor of a train represents the company for the time and is the master of the engineer who is obliged to obey his orders. In this case it is said in the opinion: "The pretention that no responsibility can attach to the company except when it is present though its chief officer would practically relieve it from all responsibility, with its president in New York and its directors equally remote no possibility of fastening upon it any liability whatever would exist. No other doctrine than that it is present in the person of those of its employees who for the time operate it would give the smallest modicum of protection to the public."

MAINE.

Here the superior-servant limitation is rejected.

Injury to Hand on Construction Train—Order to Mount Moving Car.

In *Cassidy v. Maine Cent. R. Co.*, 76 Me. 488, it appeared that a person in charge of a railroad construction train ordered the plaintiff's intestate, an employee, to jump upon a car from a station platform, while the train was in motion. Deceased caught hold of a stake in a platform car, the stake not being at the time properly secured by the dog or pawl, and was thereby injured. It was held that the conductor who gave the order was the fellow servant of deceased, in a common-associated service, and there could be no recovery for the injury.

Engineers.

In *Lasky v. Canadian Pac. Ry. Co.*, 83 Me. 461, 22 Atl. 367, it is held that conductors and engineers are fellow servants.

MASSACHUSETTS.

The superior-servant limitation is also rejected in this jurisdiction.

Injury to Conductor—Negligence of Brakeman.

In *Hayes v. Western R. Corp.*, 3 Cush. (Mass.) 270, it is held that the conductor and brakeman of a train are fellow servants; and the railroad company is not liable for an injury to the former resulting from the negligence of the brakeman.

Injury to Car Coupler—Drawbars of Unequal Height—Order of Conductor.

In *Lawless v. Connecticut River R. Co.*, 136 Mass. 1, it is held that at the trial of an action against a railroad for personal injuries occasioned to plaintiff while in its employ as a brakeman, by reason of the drawbar on a locomotive being too low for the work for which it was used, the defendant had no ground of exception to a refusal to rule that, "if the jury find that the conductor or any person in charge of the cars at the time, directed the coupling of an engine to a car the drawbars of which were of unequal height, whereby the injury was caused, the plaintiff cannot recover, the injury being the result of the carelessness of a fellow servant."

Note

MICHIGAN.

Here the superior-servant rule has always been rejected.
Brakemen.

Conductors and brakemen are fellow servants whose acts are not independent in such a sense as to separate them from each other in the line of dangers. So held in *Smith v. Flint & Pierre Marquette Ry.*, 46 Mich. 258, 9 N. W. 273.

Injury to Brakeman Unloading Freight.

A conductor of a freight train, under whose direction a brakeman is assisting in unloading freight is the fellow servant of the brakeman. So held in *La Pierre v. Chicago & Grand Trunk Ry. Co.*, 99 Mich. 212, 58 N. W. 60.

Injury to Brakeman—Management of Locomotive.

In *Rodman v. Michigan R. Co.*, 55 Mich. 57, 20 N. W. 788, a judgment denying that a brakeman could recover against his railway company for an injury received in consequence of the conductor's managing the locomotive was affirmed by an equal division of the supreme court.

MISSISSIPPI.

In this jurisdiction, the superior-servant rule, independent of statute law, has never prevailed.

Injury to Trainmen.

In *Chicago, etc., R. Co. v. Doyle (Miss.)*, 8 Am. & Eng. R. Cas. 171, it is held that the negligence of a conductor which results in injury to a member of his train crew is the negligence of the latter's fellow servant, for which the company is not liable.

Boy Compelled by Threats to Uncouple.

But in *New Orleans, etc., R. Co. v. Harrison*, 48 Miss. 112, it is held that a conductor is not a fellow servant of boy, not an employee of the company, whom he compels by threats to uncouple cars.

MISSOURI.

Here the superior-servant rule prevails, but was held not applicable in the following cases.

Defective Appliance—Relying on Conductor's Assurance.

In *McGowan v. St. Louis & I. M. R. R. Co.*, 61 Mo. 528, it is held, in an action for personal injuries from the giving way of a hoisting apparatus, used in connection with a train of the defendant railroad company, it appeared that plaintiff had reason to believe at the time that the apparatus was unsafe, but relied on the assurance of the conductor of the train that it was all right; and was injured by reason of its condition. But there was no evidence that the conductor had the superintendence or control over the men or the work, or power to provide or replace machinery. It was held that the conductor, in giving such assurance, was acting as a fellow servant merely, and the company was not responsible on that account.

All Trainmen Prima Facie Fellow Servants.

And in *McGowan v. St. Louis & I. M. R. R. Co.*, 61 Mo. 528, it is held that prima facie all employees on a train, including conductors, are fellow servants.

NEBRASKA.

The supreme court of this state fully sustains the superior-servant rule.

Injury to Brakeman—Presumption.

In *Clark v. Hughes*, 51 Neb. 780, 71 N. W. 776, it is held that a conductor in charge of a freight train is a vice principal with respect to a brakeman thereon; and where the latter is injured through the negligence of the conductor, acting in the line of his

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duty, it will be presumed that such negligence was the negligence of the railroad company.

Conductor of Gravel Train.

In *Burlington & M. R. R. Co. v. Crockett*, 19 Neb. 138, 26 N. W. 921, it is held that the conductor of a gravel train is a vice principal as to gang of men under his immediate control, in the employ of the railroad company. See also, *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb. 254, 20 N. W. 198.

NEW JERSEY.

O'Brien v. American Dredging Co., 53 N. J. L. 291, 21 Atl. 324, sides with the line of decisions, which repudiates the doctrine of *Chicago & M. R. R. Co. v. Ross*, 112 U. S. 377. In this state the superior-servant limitation has never prevailed.

NEW YORK.

The highest court of this state has always rejected the superior-servant doctrine.

Injury to Brakeman—Excessive Speed.

In *Sherman v. Rochester & S. R. R. Co.*, 17 N. Y. 153, applying the rule that a servant who sustains an injury from the negligence of a superior agent engaged in the same general business can maintain no action against their common employer, although he was subject to the control of such superior agent and could not guard against his negligence or its consequences, it is held that a brakeman, whose duty it is not to apply the brakes except when directed by the engineer or conductor, cannot recover against the company for an injury resulting from the culpable speed at which the engineer and conductor ran the train.

Running Train over Dangerous Grade—Discretionary Powers.

In *Wooden v. Western N. Y. & P. R. Co.*, 147 N. Y. 508, 42 N. E. 199, it is held that negligence is not to be imputed to a railroad company towards its brakeman in committing to the judgment of conductors of freight trains the decisions as to action under a printed and posted rule of which all the employees were chargeable with notice, directing conductors to apply for instructions when in doubt as to their ability to take their train over a well-known dangerous summit in safety, and a careless or negligent performance of a conductor's duties under such rule is a risk assumed by the other trainmen of his train, his fellow servants. This case reaffirms the doctrine of *Slater v. Jewett*, 85 N. Y. 61.

Injury to Brakeman—Collision—Failure of Conductor to Deliver Train Dispatcher's Order to Engineer.

In *Slater v. Jewett*, 85 N. Y. 61, it appeared that deceased was a fireman, and was killed in a collision between his train and another; that it was the custom and was prescribed by the general regulations for running trains on the road, that when trains were behind time they should be moved in accordance with special telegraphic orders from the train dispatcher, to be communicated by the telegraph operators receiving them to the conductor and engineer of the train; in the presence of each other. An order was so sent directing where the train which collided with the train upon which deceased was should meet the latter. The operator communicated it to the conductor but not to the engineer. The conductor, without the authority or assent of the engineer, signed the name of the latter in acknowledgment of the receipt of order. And the train dispatcher was advised that the order had been correctly delivered. The conductor forgot to deliver the order to the engineer, who, in ignorance of it, instead of waiting at the station designated until the other train came up, proceeded with his train, and the collision occurred. In an action to recover damages there was no evidence but that the operator and conductor were competent and skillful when

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employed. It did appear that defendant's rules and regulations were well devised for safety, and had been in use for a number of years without occasioning any accident. It was held that the negligence was that of fellow servants of deceased in the same common employment, for which the railroad company was not liable. In this case it is said in the opinion: "It is not true that, on an occasion like this, it is the duty of the master, or a part of his contract, to see to it, as with a personal sight and touch, that notice of a temporary and special interference with a general time table comes to the intelligent apprehension of all those whom it is to govern in the running of an approaching train. It is utterly impracticable so to do, and a brakeman or a fireman on a train knows that it is, as well as any person connected with the business. He knows that trains will often and unexpectedly require to be stopped and started by telegraphic orders from distant points, and that such orders must, from the nature of the case, be given through servants skilled in receiving and transmitting them. If there is due care and diligence in choosing competent persons for that duty, a negligence by them in the performance of it is a risk of the employment that the coemployee takes when he enters the service. Such a variation, and the giving notice of it, is not like the supply of suitable and safe machinery or of competent and skilled fellow workmen. It is the act of an hour or an instant, which for any useful effect to be got from it must be done at the instant, and that, too, from a distance. It is, from its nature and need, looked for as such. Of necessity it must be done through the best means of communication that experience, the safe and successful use of years, has demonstrated it to be prudent to employ. The act of supplying machinery or fellow servants is one for which time may be taken and deliberation had, and it may be learned before hazard is run whether the effort at supply has been well made and is sufficient."

NORTH CAROLINA.

In this state a modification of the superior-servant doctrine prevails. It is held that whether the master is responsible for the negligence of the superior servant depends upon whether the servant injured by such negligence was justified in believing that his refusal to obey the superior would be followed by his discharge from his employment.

Hand on Gravel Train—Authority to Discharge.

In *Dobben v. Richmond & Danville R. Co.*, 81 N. Car. 446, it appeared that plaintiff was employed as a train hand, and was injured while engaged in digging gravel under the direction of one L. who was engineer, superintendent, conductor and master of the gravel and material train of the defendant railroad company, whose duties were to employ and discharge hands connected with the train and who had entire charge of this branch of the business over a section of defendant's road. It was held that plaintiff and such conductor were not mere fellow servants and that plaintiff was entitled to recover of the defendant for an injury sustained on account of his negligence.

Injury to Car Coupler—Negligence in Backing Cars.

In *Shadd v. Georgia, C. & N. R. Co.*, 116 N. Car. 968, 21 S. E. 554, it appeared that an inexperienced brakeman was ordered by the conductor of his train to make a coupling; that as he went between the cars in obedience to the command and while he was arranging a displaced link, the conductor, who could see the brakeman's danger, signaled to the engineer to back the train and at the same time shouted to the plaintiff not to miss the coupling. It was held that it was error to charge that plaintiff could not recover for injuries sustained in so attempting to obey the orders of a vice principal.

Brakeman Ordered to Jump between Cars.

In *Mason v. Richmond & Danville R. Co.*, 114 N. Car. 718, 19 S.

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E. 362, it is held that a conductor while in charge of a train is, with respect to those subject to his orders on the same train a vice principal acting for the company. In this case it is said in the opinion: "The supreme court of Georgia, in *Railroad v. Delroy*, 71 Ga. 406, held that while neither a conductor nor any other officer had a right to order an employee to get on or off a moving train, and the employee was not bound to obey it, yet where the conductor did give the order and the brakeman obeyed it, the act of the conductor was the act of the corporation, and the corporation could not escape responsibility for its own wrong. The court held in that case that it was immaterial what the rules of the company were, and so, in our case, where the brakeman was ordered to jump between cars instead of from the top of a car, the same principal should prevail."

Injury to Car Coupler—Cars Uncoupled by Conductor and Started without Notice.

In *Purcell v. Southern Ry. Co.*, 6 Am. & Eng. R. Cas., N. S., 784, 119 N. Car. 728, 26 S. E. 161, it is held that a conductor while in sole charge of a train is a vice principal with respect to brakemen on such train. In this case it appeared that when a brakeman was about to uncouple a car the conductor uncoupled it, and started it without notice to the brakeman, whereby the latter was injured. It was held that such negligence was that of the company, and it was liable.

In this case it is said in the opinion: "The defendant has no cause to complain of the instruction of the court that the conductor could change his own relation to the company from that of alter ego to that of a fellow servant of a brakeman by volunteering to anticipate the plaintiff in the performance of his ordinary duty. If the conductor had ordered the fireman to do an act which might reasonably have been expected to endanger the brakeman, and which did result in injury to him, the company would have been answerable for the natural consequences of his order. It would be unreasonable to hold that, by doing the careless act himself instead of ordering another who felt constrained to obey to do it, he relieved the company of responsibility. *Qui facit per alium facit per se* is the maxim which applies where, as vice principal, he compels another to do what is culpable. It would be illogical to say that, where he directs or orders, he utters the command of the company and adopts for it the act of the employee who obeys, and yet when he does the act in proper person he descends from the role of vice principal to that of servant."

OHIO.

This state was the first to adopt the superior servant limitation of the fellow-servant rule; and its supreme court has since always been consistent in supporting it.

Injury to Brakeman—Management of Train—Rationale of Doctrine.

In *Cleveland, C. & C. R. Co. v. Keary*, 3 O. St. 201, it is held that where a railroad company placed a brakeman under the control of the conductor of the train, the latter having the exclusive command of it, and the brakeman was injured through the negligence of the conductor, it was held that the brakeman was entitled to recover for the injury, as the former was not his fellow servant, but the sole and immediate representative of the company, upon whom rested the obligation to manage the train with skill and care. In this case it is said in the opinion:

"Let the company be liable only upon the maxim, *respondet superior*, or upon the obligations arising out of the contract of service, and in either view their liability for injuries to their subordinates caused by the carelessness of the conductor they have placed over them in charge of the train is, in our opinion, sufficiently apparent. This conclusion rests wholly upon the idea that the company, from

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the nature of the contract of service, is under obligations to them, as well as they to their company; and that among these obligations is that of superintending and controlling, with skill and care, the dangerous force employed, upon which their safety so essentially depends. For this purpose the conductor is employed, in this he directly represents the company. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner; and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man and a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both are necessary to produce the result. It is his to command, and theirs to obey and execute. No service is common that does not admit a common participation; and no servants are fellow when one is placed in the control of the other. Those employed to execute cannot recover for injuries arising from a failure in that part of the business committed to them, because it is their failure, and not that of their employer; and although it should happen from the negligence of but one of them, yet each one entered the common service with the knowledge that others must be engaged, and they were jointly bound to perform what was jointly entrusted to them, and the public may be concerned in their keeping a supervision over each other for the purpose. But how this can be made to extend to the conductor, over whose acts they have no supervision or control, and are not presumed to be possessed of the requisite intelligence for the purpose, we are wholly unable to see, and equally so, how the safety of travelers is likely to be jeopardized by adding to the responsibility of the conductor for his carelessness that the company places him in power."

Injury to Brakeman.

In *Lake Shore & M. S. Ry. Co. v. Spangler*, 44 O. St. 471, 8 N. E. 467, the rule that it is not competent for a railroad company to stipulate with its employees that the liability for injuries to servants caused by the carelessness of other employees who are placed in authority and control over them, was held applicable where a brakeman was injured through the negligence of the conductor of his train.

Injury to Engineer.

In *Little Miami R. Co. v. Stevens*, 20 O. 415, it was held that the railroad company was liable where engineer was injured through the negligence of the conductor of his train, as the latter was the representative of the company.

OREGON.

Here the superior-servant rule is rejected.

Conductor Having Care of Switches.

In *Miller v. Southern Pac. Co.*, 20 Ore. 285, 26 Pac. 70, it is held that a conductor charged with the responsibility of seeing that switches are properly adjusted is not a vice principal.

PENNSYLVANIA.

In this jurisdiction the superior-servant doctrine has been uniformly rejected.

Death of Brakeman—Failure to Protect Train from Collision.

In *Hoover v. Beech Creek R. R.*, 154 Pa. St. 362, 26 Atl. 315, it is held there can be no recovery for the death of a brakeman in a collision between trains, where the accident was the result of the negligence of the conductor of his train in failing to side track it or to signal an approaching train.

Note

Injury to Laborer on Gravel Train Dumped through Negligence.

In *Ryon v. Cumberland Valley R. Co.*, 23 Pa. St. 384, it appeared that plaintiff, a laborer on a gravel train, was injured through the carelessness of the conductor or engineer, by the dumping of one of the cars while on their usual passage between their lodgings and their work. It was held that the master was not liable as plaintiff and the conductor were fellow servants.

SOUTH CAROLINA.

Here the superior-servant doctrine has been frequently recognized and applied. There are decisions, however, which seem to reject it. **Members of Train Crew.**

The conductor of a train is a vice principal with respect to the other trainmen, where they are under his orders. So held in *Boatwright v. Northeastern R. Co.*, 25 S. Car. 128.

Injury to Flagman—Sudden Movement of Train.

In *Hicks v. Southern Ry. Co.* (S. Car.), 41 S. E. 753, 4 R. R. R. 540, 27 Am. & Eng. R. Cas., N. S. 540, it is held that a conductor is not a fellow servant of a flagman on his own train injured by a sudden movement of a car he was boarding.

Injury to Laborer on Material Train.

The conductor of a material train, even in the matter of readjusting a switch, is a vice principal with respect to a laborer on his train. So held in *Coleman v. Wilmington, C. & A. R. Co.*, 25 S. Car. 446.

TENNESSEE.

The latest decision of the supreme court of this state directly in point seems to apply the superior-servant doctrine. It is not, however, in harmony with some of the earlier adjudications.

Injury to Fireman—Control of Train.

In *Railroad v. Spence*, 93 Tenn. 173, 23 S. W. 211, it is held that a conductor in charge of a freight train having authority to control its movements is a vice principal with respect to a fireman of the train; as a servant who is in a position of authority over the subordinate servant, is not, in law, a fellow servant in a common employment, but represents the master, who is liable for his negligence where it causes injury to one of his underlings.

Injury to Conductor—Negligence of Engineer.

But in *Ragsdale v. Memphis, etc., R. Co.*, 3 Baxt. (Tenn.) 426, it is held that there can be no recovery for an injury sustained by the conductor of a train while working under its engineer's orders, through the latter's negligence.

TEXAS.

In Texas, it seems, that the test of a master's liability for the negligence of a superior servant is whether the latter has power to hire and discharge those under him.

Absence of Authority to Hire or Discharge.

If conductors are without authority to hire or discharge brakemen, the conductor and brakeman of the same train are fellow servants. So held in *Campbell v. Cook*, 86 Tex. 630, 26 S. W. 486. See also, *Robinson v. H. & T. C. R. Co.*, 46 Tex. 540.

Injury to Conductor—Negligence of Engineer.

In *Moore v. Jones*, 15 Tex. Civ. App. 391, 39 S. W. 593, it is held that if the conductor of a train has control and superintendence over the engineer, he is a vice principal as to him, and cannot recover from the company on account of the engineer's negligence.

Injury to Hand on Gravel Train—Failure to Protect Train from Collision.

But in *Crona v. Galveston, H. & S. A. Ry. Co.* (Tex.), 17 S. W. 384, it appeared that deceased was killed while working on a gravel

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train, in a collision between such train and another; that the train dispatcher wired the conductor of the gravel train to work until a certain hour regardless of other trains; that at and after such hour it was his duty to have his train on a siding, or protected by a flag; that the collision occurred on the main line about 20 minutes after the time for him to stop work; and that his train was not protected by a flag. It was held that the accident was the result of the negligence of the conductor of the gravel train, the fellow servant of deceased, and defendant therefore was not liable for his death.

Injury to Engineer—Failure to Protect from Collision.

And in *International & C. N. R. Co. v. Culpepper* (Tex. Civ. App.), 38 S. W. 818, it appeared that the engineer stopped the train for the purpose of going under the engine and repairing a hot box; that the conductor, who controlled the movements of the train, but had no authority over the engineer, failed to flag another train so as to prevent injury to the engineer. It was held that they were fellow servants.

UTAH.

Here the superior-servant limitation is accepted without restriction. **Conductor with Full Control of Train and Crew.**

In *Openshaw v. Utah & Nevada Ry. Co.*, 6 Utah 132, it is held that the conductor of a train, who commands its movements, directs when it shall start, at what stations it shall stop, and has the general management of it and control over the persons employed upon it, represents the company, and for injuries to, or for the death of one of these employees, from the negligent acts of such conductor, the railroad company is responsible.

VIRGINIA.

The superior-servant limitation has been rejected by the latest decisions of the highest court of this state. The doctrine now prevailing is that the master's liability for injury to a servant through the negligence of another employee depends, not on the rank of the servant, but whether the negligent act was committed in the discharge of a nonassignable duty of the master.

Death of Brakeman—Collision—Violation of Rule—Rationale of Doctrine.

In *Norfolk & W. R. Co. v. Houchins' Adm'r* (Va.), 8 Am. & Eng. R. Cas., N. S., 616, it is held that the conductor of a railway train whose negligence in failing to observe a rule of the company to prevent collisions results in the death of a brakeman on such train is a fellow servant of the brakeman, and the company is not liable for his death so caused. In this case it is said in the opinion: "The mere fact that one engaged in the same work or employment is by the rules of the master for the direction and government of those in his employ made a leader, boss or conductor, or by whatever name he might be designated or known, to see to the execution of the work, and by the neglect of this leader, boss or conductor, one engaged in the same common work of the master is injured, does not of itself place the one so put in authority in the category of principal or vice principal, but the question remains whether or not the negligent servant was performing some duty which the master owed to the injured servant for his safety, and could not, therefore, delegate to another."

Conductor Acting as Brakeman—Negligence of Fireman or Engineer.

In *Eckles's Adm'r v. Norfolk, etc., R. Co.*, 96 Va. 69, 25 S. E. 545, it is held that one who, while acting as conductor of a shifting crew, undertook to act as brakeman, and, while so acting, was injured, cannot recover for such injury if it was caused by or resulted from the negligence of the engineer or fireman of such crew, they being his fellow servants.

Note

Conductor Held to Be the Company's Representative.**Conductor with Authority to Make Up Train and Assign to Duty.**

A conductor of a train who has authority to place and assign the other trainmen to duty, and to control the coupling and making up of the train, is the representative of the company, and not a fellow servant of the trainmen, with respect to all matters pertaining to the making up of the train. So held in *Moon's Adm'r v. Richmond & Alleghany R. Co.*, 78 Va. 745. In this case it is said in the opinion: "The fellow servant or coemployee for whose negligence the company is not liable, is one who is in the same common employment—that is, in the same shop, or placed with, and having no authority over, the one injured—and who is no more charged with the discretionary exercise of powers and duties imperatively resting on the company than the injured party; but where a person is placed in charge of the 'construction or repair of machinery,' the 'dispatching of trains,' the 'maintenance of ways,' etc., he is not a fellow servant with those under him, nor with those in a different department of the company's service. He is the agent of the company, which has assumed, through him, the performance of duties which are absolute and imperative; the omission or the negligence of performing which the law will in nowise excuse."

But in *Norfolk & W. R. Co. v. Nuckol*, 91 Va. 193, 21 S. E. 342, it is shown that the real ground upon which the railroad was held liable in the case of *Moon's Adm'r v. R. A. R. Co.*, 78 Va. 745, was that the company had been negligent in keeping its track in a good and safe condition and the case one of "concurrence of independent concurring causes."

Injury to Brakeman—Negligence in Starting Train.

While a train was standing, its conductor ordered its brakeman to mount a car and let off a brake; and as the latter, knowing the upper round of the ladder was broken, was attempting to ascend, the conductor signaled the engineer to back up, and, a dead block being missing, the cars came together and the brakeman was injured. It was held that the company was liable, because the injury was caused by the negligence of the conductor, the company's representative, in starting the train, with knowledge of plaintiff's position. So held in *Richmond & Danville R. R. Co. v. Williams*, 86 Va. 165, 9 S. E. 990.

Injury to Car Coupler—Negligence in Signaling Forward Movement of Cars.

In *Ayers' Adm'r v. Richmond & Danville R. Co.*, 84 Va. 679, 5 S. E. 582, it appeared that deceased, a brakeman, was ordered by the conductor of his train to couple a car over the end of which lumber projected; that in attempting to do so, deceased, who was aware of the danger, was caught between the lumber and the next car; and that, upon seeing which, the conductor signaled the engineer to "go ahead quickly," which was done, causing the death of deceased. It was held that the company was liable, as the cause of the accident was the negligence of the conductor, the company's representative, in giving the signal without looking to see if deceased had made the coupling and was out of danger.

Death of Brakeman—Negligence in Permitting Inexperienced Fireman to Manage Engine.

In *Norfolk & Western R. Co. v. Thomas' Adm'r*, 90 Va. 205, 17 S. E. 884, it appeared that an engineer, with the knowledge and permission of the conductor, who was the representative of the railroad company, their common master, left the engine to be operated by an inexperienced fireman; and while making a flying switch, the brakeman was killed through the improper management of the engine by the fireman. It was held that the company was liable because the conductor permitted the engineer to turn over his engine to the inexperienced fireman.

Note

Injury to Brakeman Unloading Cars—Negligence of Conductor in Backing Train.

In *Richmond & D. R. Co. v. Brown*, 89 Va. 749, 17 S. E. 132, it appeared that a brakeman, at the command of the conductor of his train, was unloading a detached car on the main track; that to carry the freight to the depot, it was necessary to cross a switch running within a foot of the depot; that the train backed upon the switch to get some cars standing thereon alongside of the depot and the platform where such brakeman was depositing the freight; that while at work, the train approached so near him that he had no time to cross the switch, and he got between the standing cars and the platform; that while the train was being drawn away, one of the cars, being wider than the others, crushed him against the platform; and there was evidence that, when the two sections came together, they did not couple, and that plaintiff could have crossed between them. It was held that the proximate cause of the accident was the conductor's negligence, and that the injured brakeman's negligence, if any, therefore, would not prevent recovery; the conductor being a vice principal with respect to him.

Injury to Inexperienced Car Coupler—Failure to Give Proper Signals.

In *Johnson's Adm'x v. Richmond & Alleghany R. Co.*, 84 Va. 713, 5 S. E. 707, it appeared that a brakeman, a minor, on his first trip, was coupling cars under the conductor's orders, while the latter was in such a position that he could not see the brakeman at work, so as to give the proper signals to slacken speed, and by reason thereof the brakeman was killed by the cars coming violently together. It was held that the accident was caused by the negligence of the conductor, the company's representative, and the company was liable.

WASHINGTON.

In this jurisdiction the superior-servant doctrine is applied.

Injury to Car Coupler—Negligent Order.

In *Grout v. Tacoma Eastern R. Co.* (Wash.), 74 Pac. 665, 10 R. R. 253, 33 Am. & Eng. R. Cas., N. S., 253, it is held that a conductor in charge of a construction train is not a fellow servant of a brakeman thereon, so as to charge the latter with the negligence of the conductor in ordering a coupling to be made in a defective manner.

Conductor Company's Representative.

Northern Pac. R. Co. v. O'Brien, 1 Wash. 599, 21 Pac. 32, supports the doctrine that the conductor of a train is the representative of the company, for whose negligence it is liable.

WEST VIRGINIA.

In this jurisdiction the doctrine now prevailing in Virginia has the sanction of the supreme court, though some of the cases are confusing.

In *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596, it is held that the employees of a railroad company may occupy a three-fold relation towards each other (1) superior or master, (2) co-ordinate or fellow servant, (3) inferior or servant.

Conductor a Fellow Servant of Other Trainmen—Rationale of Doctrine.

In *Jackson v. Norfolk & W. R. Co.*, 43 W. Va. 380, 27 S. E. 278, it is held that a conductor is not a vice principal with respect to the other trainmen of his train, but their fellow servant. In this case it is said in the opinion: "Now, our cases * * *, holding that a conductor is a superior servant or vice principal, and not a fellow servant with other employees spring from the *Ross Case*, and I am compelled to say, are not sound in principle. I have always entertained, myself, a different opinion, but thought the *Madden Case* governed us. The prop has fallen from under those decisions. We

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ought to be right. The supreme court (of the United States) has reversed itself. Why should not we do so? It is not a rule of property. Why is a conductor not a fellow servant with other servants on that or any other train? He is not the head of another department nor working in another separate department so as to enable us to say that the injured servant did not contemplate the negligence of the conductor as one of the dangers which he might have to encounter. The conductor is simply an operative. He simply carries on the work of actual operation. He uses the track and cars provided by the master for the transaction of his business, just as the engineer and fireman use the engine and the brakeman uses the brakes. His functions are purely those of mere operation. As stated above, he is not in another, separate department from other servants on his train, nor performing the work of a separate department, but simply a particular piece of work in the operating department. His mere superiority of power of control in some respect cannot take him out of that classification or category. Most eminent authority positively settles this. The supreme court of the United States so held. Would you say that when the farmer, mine owner, or lumber man sends a lot of hands upon his work in charge of a foreman or boss or overseer,—call him what you will,—he is to indemnify them against every mistake of the foreman while doing the work? That would make every business very perilous. If not in such case, why should a railroad company be made to indemnify when it sends a lot of trainmen to run its train, under the control of a conductor? It must employ a competent conductor, but not be required to insure against his error of judgment."

Conductor a Vice Principal.

In *Haney v. Pittsburg, C., C. & St. L. Ry. Co.*, 38 W. Va. 570, 18 S. E. 748, it is held that the conductor of a train, who has entire control of it is a vice principal with respect to the other trainmen.

WISCONSIN.

In this state the superior-servant limitation has been repeatedly rejected.

Injury to Car Coupler—Negligence in Signaling.

In *Pease v. Chicago & Northwestern Ry. Co.*, 61 Wis. 163, 20 N. W. 908, the rule that a master is not responsible for injuries to his servant occasioned by the negligence of a fellow servant in the same general business was adhered to and applied to a case where a brakeman on an express train was killed through the negligence of its conductor, in signaling the engineer to start the train while the brakeman was uncoupling cars beneath the car platform, but as to whose position the conductor was in ignorance.

Injury to Snow Shoveler—Attempts to Remove Snow Bank.

In *Howland v. Milwaukee, Lake Shore & Western Ry. Co.*, 54 Wis. 226, 11 N. W. 529, it appeared that plaintiff, while upon a train in the capacity of a snow shoveler, was injured by reason of the overturning of the car in which he rode, through the act of the conductor in attempting to remove a snow bank from the track by means of the snow plow alone, aided by the momentum of the train. It was held that the fact that the negligence of the conductor who was plaintiff's fellow servant, prevented recovery.

A. R. Y.

ROBERTS v. SIOUX CITY & P. R. CO. et al.

(Supreme Court of Nebraska, Jan. 5, 1905.)

[102 N. W. Rep. 60.]

Eminent Domain—Procedure—Validity—Presumption from Lapse of Time.

"When, after the lapse of 30 years or more, the record of proceedings in the exercise of the power of eminent domain is shown to be such that they would have been valid under any circumstances, and where both parties have treated them as valid, such circumstances will, if necessary, and in the absence of evidence to the contrary, be presumed to have existed.

Right of Way—Adverse Use—Use for Agricultural Purposes.

The use for agricultural purposes, such as grazing and cultivation, by adjoining landowners, of otherwise unused and unfenced parts of the right of way of a railroad company, is not inconsistent with or adverse to the enjoyment of the easement.

Same—Same—Use by Individual for Purposes Connected with Carrier's Business.

Occupancy, by an individual, of parts of the right of way of a railroad company obtained by condemnation proceedings, with elevators, granaries, coal sheds, and similar structures, used in carrying on his business, and by the company, as a common carrier, for convenience in handling his shipments, will not be treated as adverse or under claim of title, unless actual notice of such claim is brought home to the company, or his conduct is such as will, as a matter of law, constitute such notice.

Same—Same—Same—Absence of Express Agreement.

In the absence of such notice or conduct, the erection and maintenance of such buildings without express agreement therefor will be regarded as being with the permission, consent, or license of the company, and subject to its right to resume possession of the ground whenever necessity requires its use for railroad purposes.

Railroad Right of Way—Adverse Possession—Issues.*

The question whether in any case a railroad company can be deprived of its right of way by adverse possession is not involved in this case, and for that reason is not decided.

(Syllabus by the Court.)

Appeal from District Court, Washington County; Keysor, Judge.

Action by Robert E. Roberts against the Sioux City & Pacific Railroad Company and another. Judgment for defendants, and plaintiff appeals. Reversed.

James W. Carr, for appellant.

Ben T. White and James B. Sheean, for appellees.

*As to whether title by adverse possession can be acquired against a railroad company to lands originally acquired by it for railroad purposes, see foot-notes appended to *Bubenzer v. Philadelphia, B. & W. R. Co.* (Del.), 12 R. R. R. 214, 35 Am. & Eng. R. Cas., N. S., 214.

For all preceding authorities in this series on the subject of adverse possession against railroad companies, see foot-notes appended to *Chicago, B. & Q. R. Co. v. Hammond* (Ill.), 12 R. R. R. 561, 35 Am. & Eng. R. Cas., N. S., 561.

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BARNES, J. The appellant, as plaintiff, commenced this action in the district court of Washington county to obtain a decree quieting the title in himself to a strip of land 50 feet in width lying along and adjacent to another strip 100 feet in width occupied by one of the defendants, appellee herein, for the operation of its railroad. The trial resulted in a decree quieting the title in the plaintiff to a small part of the land in controversy, on which he had erected an elevator, and a judgment in favor of the defendant as to the rest of the premises. The case comes here by appeal, and the railroad company claims both strips of land are included in its right of way acquired by the exercise of the power of eminent domain in the year 1868; while appellant denied such acquisition because of certain alleged defects in the condemnation proceedings, and contends that by reason of such defects the court acquired no jurisdiction, and that such proceedings were void. The trial court sustained the contention of the railroad company so far as the condemnation proceedings are concerned, and, as his opinion on that question fully accords with our views, and has our approval, we adopt that part of it as our own:

"Defendants claim a right of way through plaintiff's land one hundred feet wide on each side of the center line of their track, and are threatening to take possession thereof to its full width. Plaintiff admits that they have a right of way fifty feet wide on each side of the center line of their track, and brings this action for the purpose of enjoining them from excluding him from either of the strips of land which lie between the fifty feet and the one hundred feet limits. It appears that prior to and at the time of the building of the Sioux City & Pacific Railroad through Washington county plaintiff was in possession of three contiguous quarter sections of land adjacent to the village of Arlington, and extending east therefrom. The first, being the northwest quarter of section 18, township 17, range 10, he occupied as the tenant of one Thomas Beatty; the second, being the northeast quarter of said section, he owned and resided upon, which, for the sake of convenience, will be hereinafter referred to as the 'homestead'; and the third, being the northwest quarter of section 17, in said township and range, he held possession of under a privilege of cutting hay thereon. July 19, 1868, the aforesaid railroad company filed an application in the county court of said county for the appointment of commissioners for the condemnation of a right of way across said quarter sections of land one hundred feet on each side of the center line of its tracks. Commissioners were accordingly appointed, and they reported to said court that the plaintiff was damaged in the sum of one hundred and fifty dollars for the right of way as prayed for through his homestead quarter. From this award he appealed to the district court; but he subsequently settled with the company

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for five hundred dollars, dismissed his appeal, and delivered to the company a deed which conveyed to it an easement of 200 feet wide across said homestead. Plaintiff now alleges that defendants obtained no right of way by virtue of said proceedings, because it was in many respects irregular and void. But if said condemnation proceedings were irregular, or even void, plaintiff estopped himself from making such a plea when he dismissed his appeal and accepted the \$500 from the railroad company. *Kile v. Yellowhead*, 80 Ill. 208; *Hartshorn v. Potroff*, 89 Ill. 509; *Burns v. Railroad Company*, 9 Wis. 450; *Hitchcock v. Danbury Co.*, 25 Conn. 516; *Trester v. Railroad Company*, 33 Neb. 171, 49 N. W. 1110. At all events, plaintiff's right of way deed closes his mouth as to the existence of a 200-foot right of way across his homestead. It is true, however, that he alleges that said deed was altered subsequent to delivery thereof by a change of the word 'fifty' to 'one hundred,' thereby making the right of way 200 feet instead of 100 feet wide. But we are compelled, by a preponderance of the evidence, to find that he was mistaken. The recital in the deed that said alteration was made before the execution of the deed, the appearance of the ink, and the similarity of the penmanship of said alleged alterations with the handwriting of the body of the instrument, and J. A. Unthank's testimony, all convince the court that plaintiff has forgotten the circumstances attending the execution of the deed and about the alteration, and that he must have known at the time that he was making a conveyance of a 200-foot easement to the company. Moreover, the condemnation proceedings, of which he certainly had knowledge, related to a 200-foot right of way, and so did the release which he gave to the company for damages. The conclusion is irresistible that the plaintiff knew that the railroad company was attempting to procure a 200-foot right of way, not only through his homestead, but also through the other two quarter sections of land (indeed, he so testified); and that as to said homestead he is now estopped by his deed to claim otherwise. That the company obtained a 200-foot right of way through the other two quarter sections of land is not so clear. In *Trester v. Missouri Pacific R. R. Co.*, 33 Neb. 171, 49 N. W. 1110, it was held that a petition for the appointment of freeholders to assess damages should state, among other things, the names of the landowners, if known, a description of the land over which the railroad is located, the width required for right of way purposes, and that the landowner refuses to grant a right of way through his premises. The petition filed in the condemnation proceedings in question did not state the names of the owners of the lands over which the railroad had been located, or recite that the owners were unknown, or allege that they had refused to grant a right of way over their premises. Plaintiff contend that these omissions render the petition

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jurisdictionally defective, and that therefore all of the proceedings based thereon are void. While the petition does not allege that the owners of said two quarter sections of land were unknown, the proceeding was evidently begun by the company and heard by the court on that assumption. The published notice described them as unknown owners, and that is sufficient proof of the fact, which has passed unchallenged for thirty-four years. If the names of the owners were unknown, it is manifest that they could not have been inserted in the petition, and that the rule laid down by the case of *Trester v. Missouri Pacific R. R. Co.* was not intended to be applicable to such a case as this. An allegation that the names of the owners of the lands were unknown was a proper one, and it ought to have been put into the petition; but its omission was not fatal to the jurisdiction of the county court. So, too, the omission of an allegation that the owners had refused to grant a right of way over their premises is immaterial for, after a studious consideration of the statutes, and for what seems to be the better reasoning, and in the absence, too, of authorities to the contrary, we are of the opinion that in cases of nonresidents it is not essential to the jurisdiction of the county court that a railroad company should allege in its application for the appointment of commissioners that it had first tried to obtain a right of way by agreement with the owners of the lands over which its railroad was located. Under this view of the law the application aforesaid was sufficient to give the county court jurisdiction as to the other two quarter sections of land whose owners the evidence shows were then nonresidents.

"The notice served on nonresidents by publication was published in a newspaper in Douglas county, and it was a legal notice if there were no newspaper then being published in Washington county. Plaintiff claims that the burden of showing that there was no newspaper published in Washington county at that time rests upon the defendants, because they must prove a valid condemnation proceeding. The fact that the notice was published in another county, that the county court acted on said notice, and that said notice has passed unchallenged for nearly thirty-five years, makes a prima facie case in defendant's favor as to this issue, and in the absence of testimony to the contrary warrants the court in holding that said notice was properly published, and is valid.

"Plaintiff also alleges that said condemnation proceedings were invalid because of want of proof of payment of the damages awarded. He admits that he received \$500 for a right of way through his homestead. J. A. Unthank testifies that he received from the county court, for his nephew, the damages which were awarded for a right of way over the northwest quarter of section 18; and, even if there be no evi-

dence of his authority to receive said damages, his testimony nevertheless proves that they were paid into the county court. The county court record has the word 'Paid' written on the margin of the page opposite the descriptions 'Northwest quarter of section 17,' and 'Northwest quarter of section 18.' This word, standing before the description 'Northwest quarter of section 17,' is verified by Mr. Unthank's testimony; and if it is properly before the northwest quarter of section 17, on which the damages were paid, then it is reasonable to believe that it would not have been written opposite the northwest quarter of section 18, unless the damages had been paid on that quarter also. There is no apparent reason why the railroad company should have paid in the damages on one quarter section and not on the other, nor why the county court should have written the word 'Paid' rightly before one description and wrongly before the other. In *Livingston v. Arnoux*, 56 N. Y. 518, it was held that 'an official memorandum made by an officer against his own interest is evidence as well of the fact against his interest as of the other matters contained in it.' The evidence shows that the damages were paid into the county court, and it is reasonable to infer that the owners of the lands received the money. It is, at all events, very unlikely that plaintiff, who was then occupying the land as an agent, and who had full knowledge of the condemnation proceedings, did not inform his principals of the seizure of a right of way over their land, and that they did not thereafter demand and receive the damages due them. We are therefore of the opinion and so find, that the Sioux City & Pacific Ry. Co. did, by valid condemnation proceedings, obtain a right of way two hundred feet wide over the aforesaid three quarter section of land. The right thus obtained was only an easement under which the railroad company was entitled to use the land thus condemned as a highway for the purpose of operating its road, but the fee remained in the holders of the legal title, who were the owners of the servient estate."

The appellant further contends that he has obtained title to the strip of land in controversy, or at least a part of it, by reason of his alleged open, notorious, exclusive, continuous, and uninterrupted adverse possession thereof under a claim of title for more than the statutory period of limitation. This requires an examination of the evidence, and a finding on that question. It appears from the record that, except as to that part of the north 50-foot strip which lies west of the defendant's section house, the plaintiff's use of the disputed part of defendant's right of way was for agricultural purposes. The evidence contained in the bill of exceptions shows that the plaintiff cultivated a part of the right of way situated outside of the railroad fences, cut grass thereon, in fact farmed the same up to said fences. Such use was permissive only, and not at all inconsistent with the defendant's

use of its easement. Plaintiff, being the holder of the legal title, had a right to cut the grass and timber, and to cultivate the right of way outside of the railroad company's fences, so long as the company did not need the grass and timber for the maintenance of its track and such cultivation did not interfere within the proper and safe running of its trains. We fail to see anything in either the plaintiff's claim to the grass and timber or his cultivation of the right of way which was outside of the defendant's fences, which would indicate that such use was other than permissive. It is true that appellant, Roberts, erected fences for calf pastures and hog lots, but the use of the right of way for such purposes was not less permissive and consistent with the company's rights than was his cropping of the ground within the 200-foot strip. It appears that payment was made to the plaintiff of \$100 by Mr. Hall, the defendant's agent, for permission to remove earth from said disputed land, and for a waiver of damages therefor, and it is claimed that such payment was a recognition of the plaintiff's claim of title, but it is doubtful whether that act of the company, which appears to have been done in ignorance of its rights, or in forgetfulness of the true width of its easement, should be held sufficient to take from it a large tract of land which the state has permitted it to acquire and hold for the purpose of a public highway. If, as was held by the Supreme Court of Maryland, a railroad company cannot grant an easement across its right of way, it certainly cannot lose its right of way by unnecessarily paying out money for some of the earth thereof. *Sapp v. N. C. Ry. Co.*, 51 Md. 115. Again, the plaintiff's possession of a large part of the 50-foot strip in question north of the defendant's track was not exclusive, for the public used said strip at least to the width of an ordinary wagon track as a public road; and the same may be said of that ground which was used by the company for the storing of ties. In order to obtain title by adverse possession, the plaintiff's use of the portion of the railroad company's right of way in question must have not been permissive, but must have been of such a character as to thereby apprise the railroad company that the possession was intended to be adverse, and hostile to its easement. The great weight of authority is that fencing and cultivating a right of way, cutting the grass and timber thereon, and using the land for pasturage, are not evidence of an adverse holding, because the owner of the fee has the right to do these things so long as they do not interfere with the operation of trains. They are in themselves no notice to the company that its right to use its right of way to its full width when needed will be contested or denied. The Supreme Court of Iowa, in *Slocumb v. C., B. & Q. R. R. Co.*, 57 Iowa, 675, 11 N. W. 641 (a case very much like the one at bar), said: "Plaintiff's possession was not adverse to, nor inconsistent with, the right of the

defendant to occupy the whole right of way whenever it became necessary or desirable to do so." The use of the plaintiff of the condemned lands alongside of the railroad for agricultural purposes so long as the same was not required for the purpose of convenience or necessity by the railroad company, was a use entirely consistent with his right as the owner of the fee, and was not incompatible with the easement granted to the railroad company. *Ry. Co. v. Telford*, 89 Tenn. 293, 14 S. W. 776; *Mobile, etc., Co. v. Donovan* (Tenn.) 58 S. W. 309. In *Northern Pac., etc., Trust Co. v. Enyard* (Wash.) 64 Pac. 516, the court said: "Fencing and cultivating land for over ten years, which is subject to a right of way, is not adverse, but permissive, since it is not inconsistent with such right of way." We are therefore of the opinion that the law is, and as a matter of right and logical reason ought to be, that no part of a railroad company's right of way which has been validly procured and paid for, and over which it is running its trains daily, can be lost to it by the use thereof of the owner of the adjoining land, which is permissive or consistent with the company's use of its tracks; such as cultivating, pasturing, mowing, or cutting the timber thereof. In this state, where thousands of fertile acres of railroad rights of way can be profitably cultivated by adjoining landowners without detriment to the railroads, the court ought not to deprive the state and the landowners of such sources of profit by adopting a rule which will compel the railroad companies to fence their rights of way to their full width in order to save their easements.

Plaintiff has called the court's attention to that section of the statute which relates to fencing railroads, and has argued inferentially, at least, that a railroad company loses its right of way by failing to fence it. This statute requires the fencing of a right of way for the protection of live stock, and it does not provide that a failure to fence shall in any respect affect its right to its easement or determine the width thereof. The use of its track by a railroad company is an assertion of its right to the full width of its right of way, and it is immaterial where it places its fences for the exclusion of stock from its track. The location of such fences is not in itself conclusive evidence of abandonment of any part of the right of way which may be outside thereof. The statute is a police regulation, and the only penalty for its violation is an action for negligence.

It is said that there is no evidence that the 50-foot strips of right of way in dispute are necessary for the operation of defendant's railroad, and therefore the plaintiff claims that he ought at all events to be awarded the injunction prayed for. The statute provides that a railroad company may acquire for right of way purposes so much land as may be necessary therefor, not exceeding 200 feet in width. Whether the amount asked for in a condemnation proceeding is neces-

sary or not must be determined in such proceeding, and the condemnation of a certain width for a right of way is an adjudication that said width is necessary. The case of the Northern Pacific R. R. Co. v. Smith, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157, was an ejectment suit against the company to recover a portion of its right of way. The trial court found that the company claimed a 400-foot right of way under a grant by Congress, that the company had actually used only 25 feet thereof, that the remaining part was not necessary for the operation of the road, and that the plaintiff should recover. The Supreme Court of the United States reversed the case, holding that a grant of 400-foot right of way was conclusive that such an amount was necessary, and that a showing of the amount actually used was immaterial. The case is also an authority that ejectment will not lie against a right of way obtained with the knowledge of the owner of the fee. Under this decision the plaintiff herein could not recover the land in question by ejectment, and it is therefore doubtful about his right to an injunction to prevent the company taking its own. The most logical rule is that announced in *Hurd v. Rutland Railroad Company*, 25 Vt. 116, in which the Supreme Court of that state held that those from whom land has been taken for a right of way retain no unquestionable right to its use for pasturage or otherwise, and that the right of the railroad company to the use and possession of its right of way is absolute during the existence of the easement. *Dietrichs v. Lincoln, etc., Railroad Co.*, 13 Neb. 361, 13 N. W. 624, is a decision to the effect that the judgment of a railroad manager that a certain tract of land ought to be condemned for railroad purposes is *prima facie* evidence that said land is necessary for the operation of the road. If this be so, then the judgment of the defendant, as indicated by the threat alleged that it ought to take possession of its right of way to its full width, ought to be at least *prima facie* evidence of the necessity of such taking, and casts upon the plaintiff the burden of proving that the company does not need the land in controversy; and the cases of *Forney v. F., E. & M. V. R. R. Co.*, 23 Neb. 465, 36 N. W. 806, and *C., B. & Q. R. R. Co. v. Hull*, 24 Neb. 740, 40 N. W. 280, decide nothing contrary to this rule. It cannot be the law that even a railroad company must prove that it needs its property in order to recover possession of it. If plaintiff believed that defendant did not need a 200-foot right of way through his homestead, he should have raised that issue in the condemnation proceeding. He did not do so, and we do not perceive how he can do so now, either justly or lawfully, without at least tendering back to the company a proper part of the \$500 which he received as compensation for the 200-foot easement.

We come now to consider the rights of the parties as to that part of the 50-foot strip in question occupied by the

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plaintiff's elevator, comprising 1,960 square feet. The testimony establishes that from the west line of section 18, running north and south, which is the east line of the village of Arlington, and extending east along the railroad of the defendant's 335 feet to the fence inclosing the section house referred to in the record, is a strip of ground 50 feet wide. Upon a part of, and near the west end of, this strip the plaintiff, in the year 1880, erected a granary, extending east 100 feet and adjacent to the right of way of the defendant measuring 50 feet from the center of its track, north. He maintained said granary at that point until the year 1882, in connection with an elevator which he had erected upon the ground which he leased of the defendant on its 50-foot right of way, at which time he removed the granary referred to across the road to the north, and erected upon the former site of said granary a gristmill, at which time the defendant the Sioux City & Pacific Railroad Company, at the request of the plaintiff, constructed a spur track from its main line to the plaintiff's mill for his accommodation in the shipment of the products of the mill. The spur track was constructed from near the section house over the 50-foot right of way on the north of the main tracks of the railroad toward the west, parallel with the side track to a point a short distance west and south of the mill. Some time during the spring of the year 1885 the elevator which plaintiff was maintaining upon the ground which he leased of the defendant southwest of the mill, together with the mill, was burned to the ground, and the plaintiff discontinued the use of the leased ground. Plaintiff immediately began the construction of an elevator upon the site of the mill which was burned, and which had been formerly occupied by the granaries referred to; also some coal houses, which extended for some distance to the east thereof, being something near 100 feet in length, east of the elevator. From that point to the west line of the fence inclosing the section house plaintiff occupied the ground with his lumber yard and for a stone yard until the year 1898, when he tore down a portion of the coalhouse, and erected, or permitted to be erected, another elevator, which is occupied by his lessee, who is the son of the plaintiff, and which they continued to occupy and use until the commencement of this suit. At the place where this elevator is standing, the tracks of the company have never been fenced by it, but appellant (Roberts) has maintained a fence inclosing his own land upon a line running 100 feet north of the track; that is, along the northern boundary of the right of way as claimed by the company. The controverted strip lying between this boundary and a line running parallel with and 50 feet from the track has, with the exception of that part of it actually occupied by the above-mentioned structures of appellant, continuously since the building of the road been in use by the company for a section house yard, for a spur

track, and as dumping and storage ground for ties, rails, and like material, and by the permissive use of a part of it by the public for a road. During the same time the company have burned fire guards and cut the grass growing upon the ground in like manner as with other parts of its right of way. The now existing elevator was built in 1900, in the face of protest and disputed right, so that there are no equitable considerations of estoppel or other kind to obscure legal principles or restrain their application.

It seems, then, that the strip lying 50 feet north of the unfenced portion of the company's track, if regarded as a whole, was used in common by the appellant and the company and by the public for highway purposes. We think this fact has an important bearing upon the question whether appellant had open, notorious, and exclusive possession under claim of title to the grounds occupied by his buildings. That the company was ever actually notified that he made such a claim, or regarded his possession as so characterized, until about the time of the building of the new elevator, is not asserted; and the first building he erected on the right of way, on a site adjoining the land in dispute, was built under a lease from the company. Elevators, granaries, cribs, coal sheds, and similar structures are in the nature of warehouses, and serve as adjuncts and accessories to the carrying on of the trade and transportation which are the principal objects for which railroad companies are created. As in the case of passenger stations and depot buildings, it is within the charter powers of the companies to erect and maintain them themselves, or they may permit them to be built by other corporations or by individuals upon their rights of way, and in either case they serve the same purpose. But, in the nature of things, at least in the absence of agreement or evidence to the contrary, such occupancy must be regarded as permissive, and subject to be terminated at any time when the company shall require the grounds for the erection of such structure by itself, or for occupancy by side tracks and sidings; otherwise the utmost vigilance might be required of railroad corporations to preserve the beneficial and necessary use of their rights of way for their own purposes from being destroyed or taken away from them by "squatters" and adverse claimants. Manifestly, as it seems to us, such a situation would be contrary to public policy.

Again, as we have stated above, a railroad company acquiring its right of way by condemnation proceedings under the Constitution and laws of this state does not obtain a fee title thereto. It secures merely an easement in the right of way, which authorize it to build and operate its railroad as a public highway. The fee title and servient estate remains in the original owner, and may be sold and conveyed by him to another. In the very nature of things, the railroad company cannot dispose of, alienate, or even lease its easement for any

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purpose except for the operation of a railroad; and whenever the right of way is abandoned for that purpose it reverts at once to the owner of the servient estate. Such was the right obtained by the railroad company to the land in controversy in this case. Therefore it is not manifest to us how title or right to this easement of the company can be obtained by a third person by adverse possession. It follows, as a logical consequence, that persons erecting structures, such as the ones above described, upon railway rights of way, do so with the knowledge of existing conditions, and their occupancy will be presumed to be permissive only, and by the express or tacit license of the company at least, until the latter shall be distinctly notified that the occupiers are claiming a superior right. This conclusion renders it unnecessary to decide whether in any case a railroad company can be deprived of its right of way by adverse possession. The railroad company filed a cross-bill in the district court praying for a dismissal of the plaintiff's petition, and for a decree quieting title to its right of way over all the lands in controversy. The trial court granted the prayer except as to the elevator and site, and the right of ingress and egress thereto, adjudging the latter to be in the plaintiff. We are of the opinion that the district court was wrong in granting the plaintiff such relief, and for that reason the decree of that court must be reversed.

We find that the plaintiff has failed to show any ground for relief, that his petition should be dismissed, and that the prayer of the defendant's cross-bill should be granted to the extent that its easement be quieted in and to the whole of its right of way in question. It is therefore ordered that the decree of the district court be reversed, and a judgment entered in this court in accordance with this opinion.

Judgment accordingly.

CHRISTY et al. v. DES MOINES CITY RY. CO.

(Supreme Court of Iowa, Jan. 18, 1905.)

[102 N. W. Rep. 194.]

Street Railroads—Negligence—Instructions.

In an action against a street railroad for injuries from a collision. instructions directing a verdict for defendant if plaintiff failed to prove freedom from contributory negligence, and enumerating the acts of negligence relied on in the petition, except that of failing to stop the car after the motorman saw plaintiff's danger, and charging that, if the jury failed to find any of the acts of negligence, their verdict would be for defendant, were inconsistent with a charge that, though plaintiff was negligent, yet defendant would be liable if its employees saw plaintiff, and knew of his perilous position, and failed to use ordinary care to prevent injury.

Theory of the Case.

It is proper to submit defendant's theory of the case, although it is supported by the testimony of but one witness.

*Christy v. Des Moines City Ry. Co***Street Railroads—Negligence—Instructions.**

In an action against a street railroad for injuries from a collision, a charge that, if the motorman slowed up the car expecting that plaintiff's team would pass in front, and thereupon noticed the team turn as if to pass behind the car, and believed that it was plaintiff's intention to pass behind the car, and moved the car forward to give plaintiff more room in which to pass, when plaintiff's horses became frightened and started suddenly in front of the car, and the accident occurred without defendant's negligence, the verdict should be for defendant, did not assume the facts recited therein, and was not erroneous.

Same—Frightening Teams—Duty of Motorman.

Where a motorman observed, on moving the car forward, that a team of horses became frightened, and was undertaking to pass in front of the car, it was his duty to stop the car, if it could be done in the exercise of ordinary care, in time to avoid an injury.

Same—Municipal Ordinances—Evidence.

In an action against a street railroad for injuries from a collision, municipal ordinances requiring employees of the railroad to use reasonable care to prevent injury, and to stop the car on the appearance of danger to any one near the track, and to use proper care to prevent injury to teams, state merely general rules of law, and are properly excluded from evidence.

Bankruptcy of Party after Trial—Right to Appeal.

Where, after a trial resulting in a verdict for defendant, plaintiff was adjudged a bankrupt, and his trustee substituted, plaintiff could nevertheless prosecute an appeal on the trustee's filing his written consent thereto, and defendant had no ground of complaint.

Appeal from District Court, Polk County; Wm. H. McHenry, Judge.

Action for damages resulting in a verdict and judgment for defendant. The plaintiffs appeal. Reversed.

Carr, Hewitt, Parker & Wright and C. C. & C. L. Nourse, for appellants.

N. T. Guernsey, for appellee.

LADD, J. The defendant operates a street railway on Ninth street in Des Moines. The plaintiff, accompanied by a niece, and driving a span of three year old colts hitched to a cutter, was approaching the track from the east on State street. In crossing the cutter was struck by one of defendant's cars coming from the south, and demolished. The plaintiff was permanently injured, and one of the horses so disabled that it was subsequently shot. The city ordinances prohibited the defendant from moving its cars at a higher speed in the residence portion of the city than 12 mile per hour. Considerable evidence tended to show that this one was moving at the rate of 15 to 20 miles per hour, and, if so, the circumstances were such that it might have been found that, had the speed not exceeded that allowed by ordinance, the collision would not have occurred. The jury specially found that, as the car approached the street intersection, its speed did not exceed eight miles per hour. The motorman, corroborated somewhat by the conductor, testified that he slowed the car down to about four miles per hour,

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that Christy stopped his team, and, as he turned their heads, as if to drive to the south around the car, it started again, when the team became frightened, and lunged in a north-westerly direction in front of the car. A more particular statement is not essential to an understanding of the questions raised.

1. Appellant contends that the first, fourth, and eighth paragraphs of the court's charge are inconsistent, and because thereof tended to mislead and confuse the jury. In the first it is said that the burden of proof is on plaintiff to establish three things: "(1) That he was injured and his property destroyed by the car of the defendant at the time and place mentioned in the evidence, substantially as alleged in his petition. (2) That said injury was the natural and proximate result of negligence on the part of the defendant. (3) That the plaintiff was free from any negligence which contributed to his injury or the destruction of his property. And if the plaintiff has proven each and every of the said propositions by a preponderance of the evidence, you will find for the plaintiff; but if he has failed to establish any one of said propositions by a preponderance of the evidence, your verdict will be for the defendant." It will be observed that upon the failure to find that plaintiff was free from any negligence a verdict for defendant is directed. The fourth instruction enumerated the grounds of negligence alleged in the petition: "In approaching the crossing of State street and Ninth street without ringing the bell or gong, or making any other signal; by running over said crossing at the time at a great, dangerous, and unlawful rate of speed, and at a rate of speed greater than twelve miles per hour; in failing to keep a lookout for persons passing and repassing upon the said streets; in failing to stop the said car after the defendant's motorman saw the plaintiff approaching the said crossing, and in not having stopped the car after the said motorman saw the danger and peril of the plaintiff." The undisputed facts are then recited, and the court proceeds: "If, therefore, you find from the evidence that the defendant, by its employees in charge of said car, approached the said crossing without ringing a bell or gong or giving any other signal of its approach; that said car was at the time running over said crossing at such a rate of speed as to endanger the lives of persons traveling over the same, or at a rate of speed greater than twelve miles per hour; that its employees in charge of the car failed to slow up the said car before reaching the said crossing; and if you further find that the defendant's employees in charge of the said car in any or all of the said particulars, under all the circumstances surrounding them at the time, did not exercise reasonable and ordinary care in and about the management of the said car while approaching and passing over said crossing—then you will be warranted in finding that defendant was negli-

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gent; and if, by reason of such negligence, you further find that plaintiff sustained injury, without fault or negligence on his part, which directly contributed to said injury, then you will find for the plaintiff. But, if you fail to so find, then your verdict will be for defendant." Thus, after repeating the four grounds of negligence, the last is entirely eliminated from the hypothetical statement of facts, and the jury instructed, upon failure to find any one of the other three, or freedom from negligence on the part of plaintiff, "your verdict will be for the defendant." It may be that the word "verdict" was intended in the sense of "finding," and what was meant was verdict for defendant as to the particulars previously mentioned. But it is not so limited, nor is this the necessary import of the language. In the twentieth instruction attention is directed to the forms of verdict attached, designated as verdicts, and in the instruction following the final conclusion is referred to as a verdict. The jury might have concluded that "verdict," as found in the above instructions, had reference to the determination of the case by them, and to be expressed in one of the forms accompanying the charge; and, if so, these paragraphs were inconsistent with the eighth instruction, in which the jury was advised that: "If, under all the evidence and the foregoing instructions, you find that the plaintiff was negligent, still the defendant cannot avoid liability, if you further find from the evidence that the plaintiff at the time in question was in a perilous position, and that the defendant's employees in charge of the said car saw the plaintiff, and knew that he was in such perilous position, or might have known he was in peril by the use of ordinary care after he saw him, and thereafter failed to use ordinary care to stop the car and prevent the injury of the plaintiff; and if you further find that by the use of ordinary care defendant's employee in charge of the said car, under such circumstances, could have avoided any injury which you find the plaintiff may have sustained, then the plaintiff will be entitled to recover, and you will find for the plaintiff; but, if you fail to so find upon this part of the case, you will find for the defendant." True, the instructions are to be read together, as argued by appellee, but this does not wipe out the conflicting statements contained in those quoted. The case is readily distinguishable from *McKern v. City of Albia*, 69 Iowa, 447, 29 N. W. 421. There the jury was told, in substance, that, if the city was charged with notice of the defect in the walk, to find for plaintiff. Manifestly, this meant as to that particular matter, or in event the other issues submitted in the instructions and declared essential to recovery were found for her. The instruction contained no direction as to what verdict to return. In *State v. Calkins*, 73 Iowa, 128, 34 N. W. 777, the defendant was accused of uttering a forged instrument, and in one instruction the element of knowledge was omitted. As it

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was to be implied, however, and another instruction explicitly stated that it was essential to conviction, no prejudice could be said to have been suffered. In *Riegelman v. Todd*, 77 Iowa, 696, 42 N. W. 517, and also in *Perpetual B. & L. Ass'n v. U. S. Fidelity & Guaranty Co.*, 118 Iowa, 729, 92 N. W. 686, the general statement as to the burden of proof in the case required all the defenses to be established by a preponderance of the evidence, but, as the instructions following each defence were specifically submitted with direction that, if sustained, the verdict should be for defendant, it was thought that the jury must have understood the general statement to relate to the burden of proof merely, and could not have been misled into supposing "more was required than specifically stated as essential in considering the several defenses to justify a verdict." The instant case is ruled by *Quinn v. C., R. I & P. R. Co.*, 107 Iowa, 710, 77 N. W. 464. There the deceased went between moving cars to uncouple them, when his foot was caught in a defective switch, and he was run over. The defendant pleaded that the risk was assumed. In the fifth instruction the court told the jury that, if the injury was caused by defendant's negligence, without any fault on the part of deceased, the verdict should be for plaintiff; and, although instructed fully in another paragraph concerning his alleged assumption of risk, it was held that, "as the fifth paragraph instructed the jury in plain terms to return a verdict for the plaintiff if the statements set out were proven, it was to that extent in conflict with the other paragraph, and of a nature to confuse the jury." To the same effect, see *Meyer v. Boepple Button Co.*, 112 Iowa, 51, 83 N. W. 809. These decisions are directly in point, and, following them, paragraphs 1 and 4 of the charge must be declared erroneous and prejudicial. Appellee suggests lack of prejudice, in that a verdict for plaintiff would have been without support in the evidence. Without reviewing the record, we are content to say that the evidence was sufficient to carry the case to the jury.

2. In the ninth instruction the theory of the defendant was submitted to the jury. That this was proper, even though supported by the testimony of but one witness, cannot well be questioned. We set it out as the best response to the criticisms of appellant: "If you find from the evidence that the motorman in charge of the car in question slowed up the car, or stopped it, at the intersection of Ninth and State streets, expecting that the plaintiff's team would pass in front, and that thereupon the said motorman noticed the heads of plaintiff's team turning towards the south as if to pass behind the car; and if you find that the said motorman believed, and had reason to believe, that it was the intention of the plaintiff to turn southward, and pass behind the car, and that thereupon the motorman moved the car forward to give the plaintiff more room in which to pass behind said

car, and that the plaintiff's horses thereupon became frightened, and started suddenly toward and in front of the said car, and were by that means struck by the car; and if you conclude from such facts, if such you find to be the facts, that the accident occurred without negligence on the part of the defendant, as defined to you in these instructions—then your verdict will be for the defendant." It will be observed that the facts as recited by the motorman are hypothetically stated, and not assumed, as contended, and that even then recovery is denied only on condition that the accident occurred without any negligence on the part of the defendant. The exceptions urged are based on the exclusion of this last clause, and, of course, without it the instruction would have been erroneous. With it, the instruction is not vulnerable to the criticisms urged.

3. But the court might well have been more explicit in referring to the negligence of the defendant. Even though the motorman, acting as an ordinarily prudent person, might have supposed that plaintiff was attempting to drive behind the car, it was still a question whether, acting as an ordinarily cautious man, he should have started the car forward before the plaintiff had done so. And, even if he was not at fault in moving the car forward, yet if it had slowed down to four miles per hour, and he observed, immediately after moving it forward, that plaintiff's horses were frightened, had changed their course, and were undertaking to pass in front of the car, it was his duty to stop the car, if it could have been done, in the exercise of reasonable care, in time to avoid the injury. In other words, in submitting the theory of the case raised by the evidence introduced by defendant in the concrete, the situation, in so far as favorable to the plaintiff, and arising out of the same evidence, should also have been stated in the same way, rather than merely by reference to negligence in the abstract.

4. The following ordinances were excluded from evidence on objection by defendant because merely expressive of rules of law independent of such regulations: "(6) Conductors and drivers employed by said company shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track the car shall be stopped, when by so doing such danger can be averted. (7) All proper care shall be used by conductors and drivers to prevent injury to teams, carriages, wagons, and other vehicles." The ruling was correct. In the use of the streets the company was bound to exercise reasonable care, and in doing this must pursue such a course as will avoid injury to persons and property. If, to avert danger, the stopping of the car is necessary, it seems unnecessary to say that it must be stopped regardless of what the city council may think about the matter. See *Jeffrey v. Ry. Co.*, 51 Iowa, 439, 1 N. W. 765; *Mosnat v. Ry. Co.*, 114 Iowa,

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151, 86 N. W. 297; Isaackson v. Ry. Co. (Minn.) 77 N. W. 433. See Hart v. Cedar Rapids & M. C. R. Co., 109 Iowa, 631, 80 N. W. 662.

5. After the trial plaintiff was adjudged a bankrupt, and on motion of defendant the trustee was substituted as plaintiff about a year after the verdict was returned. Thereupon the trustee filed his written consent that Christy prosecute the action in his own name. That, under these circumstances, the plaintiff was authorized to prosecute the appeal, there can be no doubt. Thatcher v. Rockwell, 105 U. S. 467, 26 L. Ed. 949; Brown v. Wygant, 163 U. S. 624, 16 Sup. Ct. 1159, 41 L. Ed. 286; Sullivan v. Rabb, 86 Ala. 440, 5 South 749; Lancey v. Foss, 88 Me. 218, 33 Atl. 1072. The trustee might decline to take the cause of action, and leave it to the bankrupt, and, having done so, the defendant cannot be heard to complain. As to it this was *res inter alios*. Whatever he may do hereafter by way of appropriating the proceeds of the litigation can in no way affect the defendant.

Reversed.

YAZOO & M. V. R. CO. v. MATTINGLY.

(Supreme Court of Mississippi, Jan. 16, 1905.)

[37 So. Rep. 708.]

Carriers—Insult to Passenger—Exemplary Damages—Verdict.*

Where a passenger exhibited, at the customary entrance of a coach, a ticket which entitled him to transportation on board the train on which he was by virtue of the ticket entitled to travel, but was by the carrier's porter repulsed insolently, denied admission insultingly and without explanation, and from the conduct of the porter was threatened with an immediate assault, a verdict for \$2,500 exemplary damages was not excessive.

Appeal from Circuit Court, Warren County; Geo. Anderson, Judge.

Action by Walter L. Mattingly against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Mayes & Longstreet, for appellant.

Henry & Schudder, for appellee.

TRULY, J. The jury by their verdict found the following facts to be true: On the forenoon of February 23,

*As to the liability of carriers of passengers for insults by servants, and damages recoverable therefor, see foot-notes appended to Gillespie v. Brooklyn Heights R. Co. (N. Y.), 12 R. R. R. 66, 35 Am. & Eng. R. Cas., N. S., 66.

As to the right to punitive, or exemplary damages for wrongs to passengers, see foot-note appended to Chiles v. Southern Ry. (S. Car.), 12 R. R. R. 750, 35 Am. & Eng. R. Cas., N. S., 750; foot-note appended to McNamara v. St. Louis Transit Co. (Mo.), 12 R. R. R. 832, 35 Am. & Eng. R. Cas., N. S., 832.

1904, appellee, Mattingly, who was a commercial traveler, repaired to the depot of appellant company in the city of Vicksburg, with the intention of taking passage on its accommodation and local passenger train and going to Natchez. Arriving at the depot, he procured a ticket, and, handing his baggage and overcoat to a boy, proceeded towards the train. Appellee had never before traveled on this particular train, and was unfamiliar with its make up. The train consisted, in addition to its locomotive and tender, of two combination coaches; the front coach being used, one half for baggage, the other half as a smoker; the rear coach was used, one compartment for colored passengers, the other compartment for white passengers. On the occasion in question, the train being headed towards the south, the front end of the rear coach was intended for colored passengers, and the rear end for whites. When the boy carrying appellee's baggage reached the passenger coach, he attempted to get aboard at the front end, where the colored porter, Frank Brown, was standing engaged in conversation with another negro, also an employee of the railroad. Appellee, who was some 12 feet behind the boy, did not hear what transpired between Brown and the boy who had his baggage, but saw that Brown roughly prevented his getting aboard and placing the baggage on the train. Assuming that the reason why the boy was refused permission was because he was without a ticket, appellee presented his ticket to the porter, remarking, "Well, I guess I can get on, I have my ticket," attempting to get upon the steps and go in the coach, whereupon the porter, in an insulting and rude manner, replied, "No, you can't get on here," and, jumping up on the coach, placed his arms across the steps, catching the iron railing on either side, and raised his foot in a threatening manner, as if intending to kick the appellee in the face. At the time that Mattingly approached the train, the only porter in sight was the negro porter, Brown, standing at the front of the passenger coach. There was neither porter nor flagman standing at the rear end of the passenger coach, and, according to the testimony of the appellee, it was the custom of the railroad to keep the rear door of the passenger coach closed and locked in order to prevent passengers getting aboard without first presenting their tickets to the porter or flagman, whose duty it was to stand at the door of the coach. During the progress of the altercation between appellee and the porter, while appellee was insisting on boarding the train and showing his ticket as evidence of his right to transportation, the flagman, a Mr. Faulkner, came to the front of the car and inquired the cause of the trouble. Brown stated that the appellee insisted on boarding the train at that door; Faulkner advised that he be permitted to do so, whereupon Brown remarked to Faulkner: "You are the flagman, and I am the porter; you attend to your business and I'll attend to mine;"

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thereupon Faulkner left, and, Mattingly again insisting on boarding the train, the porter locked the door and walked away. During all this time there was no explanation made to appellee of any reason why he was not permitted to board the train. After the porter had gone, leaving the door locked, Mattingly walked to the rear end of the coach, where Faulkner at this time was standing, and boarded the train and continued his journey in safety. Upon getting into the rear compartment of the coach, he observed this sign hanging on the wall: "For Colored Passengers Only." This was not removed until after the train started. After taking his seat and depositing his baggage, and before the train left the depot, appellee came out of the car, asked the flagman his name, and asked the porter his name, to which, in an insulting and threatening manner, the porter answered, "My name is Frank Brown; you had better go in the baggage car and tell the conductor about it; he is in there." Appellee upon the trial, under the instruction of the court, recovered a judgment for \$5,000, but upon motion of appellant this was by the trial court reduced to \$2,500, and from this judgment the Yazoo & Mississippi Valley Railroad Company appeals, and bases its argument mainly upon the proposition that the judgment, as it now stands, is excessive.

The facts, as detailed and approved by the finding of the jury, undoubtedly evince such a flagrant violation of duty on the part of the employee of the appellant as to fully warrant the imposition of exemplary damages. A very high degree of care is imposed upon all carriers of passengers, as a duty, in their treatment of all those who obtain transportation upon their trains. This duty is not only that they shall be safely transported, but that due regard shall be observed for their safety and comfort during their transportation. This duty also requires that the passenger shall be protected from insult, assault, or injury by fellow passengers or strangers. How imperative, then, is the duty imposed upon the carrier to see that passengers are not subjected to insult or abuse on the part of its own employees. It is scarcely necessary for us to direct the attention to the wisdom of the law in imposing this obligation on all carriers of passengers. Every carrier chooses its own servants and employees, and changes or discharges them at pleasure. This matter is regulated and controlled solely by its own rules, or by the judgment of its superior officials. It is but just that the master should be responsible not only for the competency of its servants, but for the manner in which they discharge the duties intrusted to them as well. The safety of the passenger in life and limb, the comfort and convenience of the traveling public, often depend upon the competency and fidelity of the servants of the carrier. It devolves upon the carrier to employ servants both capable and trustworthy, and the only guaranty the passenger has to insure the selection of such servants is to hold the master

responsible for their violation or negligence in the discharge of duty. In this case the insolence of the employee of the appellant was, so far as this record shows, absolutely without shadow of excuse or justification, and can only be accounted for upon the theory that the porter, being clothed with a little brief authority, desired to show that authority for the admiration of his companion and for the humiliation of the appellee. Appellee, on the contrary, conducted himself, according to the testimony, with admirable self-control, and under the very trying circumstances, situate as he was, did nothing which could possibly be construed as provocative of the insolence and overbearing conduct of the porter. It is true that the porter, as a witness, contradicted the appellee upon many parts of his testimony, but the jury has decided the disputed facts against the appellant, and we are not warranted in disturbing their finding, especially when that finding is supported in many important particulars by the testimony of the only other eye witness, the flagman, who was introduced as a witness for the railroad company.

The testimony warranting the jury in imposing punitive damages, the remaining question is whether or not the amount of the verdict evinces such passion or prejudice as requires this court to interpose. An earnest argument is made upon behalf of appellant that this should be done. It is eloquently urged that the magnitude of the verdict is due to prejudice, superinduced by the peculiar attendant circumstances of the incident forming the basis of this suit. It is insisted that, as the appellee suffered no actual damage, experienced no inconvenience in his travel, as his journey was not delayed, and his entire trip made in comfort and safety, without loss of time or money, his recovery should be limited to a very small amount. It needs no sociological discussion to account for the finding of this jury. A bare statement of the facts disclosed by the record will demonstrate the correctness of that finding. A passenger, exhibiting a ticket which entitled him to transportation, endeavors to board the train, on which he is by virtue of that ticket entitled to travel, at the coach where the only porter then in sight stands to assist passengers, at the door of the coach where it is customary for passengers to enter, is, by the porter, whose duty it is to assist passengers, repulsed insolently, denied admission insultingly and without explanation, and from the acts and conduct of the porter is threatened with an immediate assault. Without regard to who the parties might be, such conduct on the part of any employee toward any passenger entitles the injured party to recover exemplary damages. The flagrancy of the violation of duty committed by the offending employee, the character of the duty which is violated, the nature of the insulting or oppressive act, the degree of humiliation inflicted upon the injured party, from the basis on which the jury calculate and graduate the amount

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of exemplary damages which, in their judgment, it may be necessary to award to properly punish the offender and guard against a repetition of the offense. In such character of case the absence of actual damage by loss of time or money or by physical injury becomes unimportant. Punitive damages are inflicted to protect the public, not merely to compensate the party injured. From these considerations, we think the appellant without just cause of complaint as to the amount of damages awarded. The instruction for appellee is substantially correct; the criticism thereof is too refined to have possibly misled the jury or affected the result. Affirmed.

KANSAS CITY NORTHWESTERN R. CO. v. SCHWAKE.

(Supreme Court of Kansas, Nov. 5, 1904.)

[78 Pac. Rep. 431.]

Eminent Domain—Damages to Abutting Owner—Appropriation of Alley.*

Where a railroad company appropriates an alley in a city for the purpose of laying its tracks, and makes a deep excavation therein close to the lot line, the damage recoverable by an abutting owner is restricted to the special injury sustained by him by reason of access to and egress from his property being cut off. A landowner does not suffer damages recoverable at law for injury to lateral support of his property until the earth is so much disturbed that it slides or falls. The actionable wrong for impairment to lateral support is not the excavation, but the act of allowing the owner's land to fall.

Mason, Atkinson, and Burch, JJ., dissenting.

(Syllabus by the Court.)

Error from District Court, Leavenworth County; J. H. Gilpatrick, Judge.

Action by Charles Schwake against the Kansas City Northwestern Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Plaintiff below (defendant in error here) is the owner of six lots in the city of Leavenworth, each 50 feet in width, facing on Front street, and extending back and abutting on an alley in the rear. Plaintiff in error laid a railway track in the alley. Preparatory thereto it dug a ditch more than 20 feet in width and from 18 to 20 feet deep. It is alleged in the petition that the railroad company "appropriated the said alley for the whole width thereof and a part and portion of the west end of the said lots of the said plaintiff, as aforesaid, permanently to its own exclusive use, and obstructing

*As to the elements of damages to private property from the construction and operation of railroads in streets, see foot-note appended to *South Bound R. R. v. Burton* (S. Car.), 10 R. R. R. 147, 33 Am. & Eng. R. Cas., N. S., 147, where all the preceding authorities in this series are collected.

the same, and running the said alley for public use, and destroying all ingress and egress thereto and therefrom, and leaving such ditch or canal in such shape that the lateral support to the plaintiff's lots has been wholly removed and destroyed, and because thereof much of the plaintiff's lots along such canal from time to time has slipped and fallen into the said canal, thereby greatly and permanently injuring his said property." It must be assumed that plaintiff below failed to prove that the railroad company extended the excavation outside the alley and onto the west end of his lots, for the reason that the damages allowed by the jury, indicated by their answers to special questions, was for loss of use of the alley and for the impairment of lateral supports to the lots. In answer to particular questions of fact the jury found that they allowed \$25 as damages for the destruction or impairment of the lateral support of lot 1, \$75 for lot 2, \$125 for lot 3, \$150 for lot 4, \$175 for lot 5, and \$200 for lot 6. The jury itemized the damages allowed as follows: "For destruction of lateral support of lots 1, 2, 3, 4, 5, and 6, \$750, and for the permanent loss of use of alley appurtenant to lots 2, 3, 4, 5, and 6, \$200."

The following question and answer appear in the record: "(72) If you find a general verdict for the plaintiff, state how much, if anything, you allow as damages because of any portion of lot 1 having slipped or fallen into the excavation made for such railroad, prior to the commencement of this action. Answer, Nothing." The same response was made to like questions respecting each of the other lots. The jury found specially that the construction of the railroad interfered with Schwake's usual manner of ingress and egress to and from his lots, and that the use of the alley which he rightfully enjoyed was destroyed. The general market value of the six lots immediately prior to the construction of the railroad was found to be \$9,000; immediately after, \$8,050. The total difference in value is \$950, for which amount the jury returned a verdict against the railroad company.

The following questions were asked and answers returned by the jury: "(140) If you find a general verdict for the plaintiff, state how much, if anything, you allow as damages for the future cost or expense of constructing a stone wall along the lots in controversy. Ans. No, we made allowance for that in damage in lateral support. * * * (160) If you find a general verdict for the plaintiff, then state whether, in arriving at the amount of such verdict, you have considered any loss or damage which plaintiff has sustained, or may in the future sustain, after the time of the construction of the track in said alley. A. Yes. (161) If the last above question is answered 'Yes,' then state what such items consist of? A. Taking away the lateral support of the lots and the destruction of the alley and its use." Defendant below filed a motion asking the court to set aside so much of the amount of the

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general verdict as was rendered for deprivation of lateral support to the lots, to wit, \$750. It also filed a motion for a new trial. Both motions were overruled, and judgment for \$950 entered on the verdict.

The instructions to the jury were to the effect that a railroad could not destroy the alley for public use, and that, if it was so destroyed, the plaintiff might treat the act of the company as a permanent appropriation of the alley and of his interest therein, and recover as damages the consequent depreciation in the value of the lots, and in such case plaintiff would be entitled to the difference between the market value of his property immediately before the alley was appropriated for railroad purposes and the market value immediately after such appropriation; that an abutter on an alley in a city has the right of ingress and egress to and from his property, of which right he cannot be deprived by any person or corporation appropriating the alley to his of its own private use. There were no instructions which authorized the jury to consider damages arising from an impairment of lateral support to the lots.

None of the evidence is preserved in the record. The railroad company assigns error in the action of the court for entering judgment on the findings for the amount of \$750 for destruction of lateral support to the lots. It contends that judgment could go against it for \$200 only, the amount allowed by the jury for the permanent loss of the use of the alley.

Waggener, Doster & Orr, for plaintiff in error.

Baker & Baker, for defendant in error.

SMITH, J. (after stating the facts). The case was tried and proceeded to judgment in the court below on the theory that the obstruction to the alley was a permanent appropriation of it by the railroad company. Such appropriation involved the weakening of the lateral support to the rear end of the lots abutting on the alley by reason of an excavation to about the depth of 18 feet, made to accommodate the railroad track. Entering into the verdict, as disclosed by the findings of the jury, was the element of damages caused by the impairment to the lateral support of the land afforded by the soil adjacent thereto, which the lots naturally had before the excavation was made. An allowance was made for the future cost of building a stone wall at the back of the lots. The jury awarded no damages because any portion of the lots had slipped or fallen into the excavation. It is a general rule, to which we have found no exceptions, that a landowner does not suffer damages recoverable at law for injury to lateral support of his property until the earth is so much disturbed that it slides or falls. The principle is well stated in *Schultz v. Bower*, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630, 632, thus: "Where one, by digging in his

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own land, causes the adjoining land of another to fall, the actionable wrong is not the excavation, but the act of allowing the other's land to fall." A leading case on the subject was decided in the House of Lords, in which it was held that the statute of limitations began to run on an action for damages based on impairment of lateral support to land, not from the time of excavation, but from the actual occurrence of the mischief, which in that case was the subsidence of the earth by the working of a mine under the plaintiff's land. *Backhouse v. Bonomi*, 1 Best & Smith's Rep. 970. Counsel in the case referred to argued that the plaintiffs were entitled to recover prospective damages for any loss which they could have shown would arise or might reasonably be expected to arise from the withdrawal of lateral support. It was decided otherwise. The following cases were in point: *Williams v. Kenney*, 14 Barb. 629; *Ludlow v. The Hudson River Railroad Co.*, 6 Lans 128; *Smith v. Seattle*, 18 Wash. 484, 51 Pac. 1057, 63 Am. St. Rep. 910; *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698, 70 N. W. 263, 36 L. R. A. 417, 61 Am. St. Rep. 578; *Jones on Easements*, § 590. While it was competent for plaintiff below to prove the market value of the lots before and after the appropriation of the alley to show the extent of the damages sustained by him, yet such damages, under the uniform decisions of this court in like cases, must be confined to the diminution in value occasioned by the peculiar and special injury sustained by the lot owner by reason of his access to and egress from the land being cut off. Decrease in market value, occasioned by an injury apart from the loss of use of the alley, cannot be shown by bringing into the case an element of damage for which no action would lie. The cases of *Leavenworth N. & S. Ry. Co. v. Curtan*, 51 Kan. 432, 33 Pac. 297, and *Central B. U. P. R. Co. v. Andrews*, 26 Kan. 702, cited by counsel for defendant in error, do not sustain their views on the right of the lot owner to recover for injury to lateral support.

Plaintiff in error asks that the judgment of the court below be modified by a direction that the sum allowed for damages to lateral support be eliminated from it. A review of the particular questions of fact submitted to the jury and their answers thereto satisfies us that they are so conflicting that no judgment for either party can be sustained. The jury found that the difference in the market value of the lots before and after the appropriation was \$950; that they had depreciated that much. On this finding judgment must go for plaintiff below, and such finding seems to have followed a proper submission of the case to the jury, for the court did not instruct that damages to lateral support might be recovered, and, in the absence of evidence, we cannot say that there was any proof of such damage. The jury allowed \$750 for damages to lateral support. This conflicts with the finding as to market value before and after appropriation,

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and is at variance with the theory on which the case was seemingly tried, inasmuch as there was nothing in the instructions authorizing a recovery for damage to lateral support, and none of the evidence is before us. It may be said that the jury, under the theory on which the case was tried, did not and could not consider the damage to lateral support, and did not mean that they had when they answered that the general market value of the lots was \$9,000 immediately before the appropriation and \$8,050 immediately afterwards. The finding that an allowance of \$750 was made for destruction of lateral support is in direct conflict with the findings respecting market value when we consider that the findings as to value were made without any evidence before the jury regarding the question of damages to lateral support.

The judgment of the court below will be reversed, and a new trial granted.

JOHNSTON, C. J., and CUNNINGHAM and GREENE, JJ., concurring.

ILLINOIS CENT. R. CO. v. MOORE.

(Court of Appeals of Kentucky, Nov. 1, 1904.)

[82 S. W. Rep. 624.]

Railroads—Right of Way—Care Required—Negligence—Injuries to Adjoining Property.

Where a railroad negligently cut and left timber on its right of way, so that during high water the same was floated out in large quantities and damaged plaintiff's adjacent property, the railroad was liable for the damages so occasioned, though it was not liable for other timber which lodged against its trestle, and which it passed, without negligence, under its trestle.

Appeal from Circuit Court, Ballard County.

"Not to be officially reported."

Action by S. J. Moore against the Illinois Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Robbins & Corbett, Pirtle & Trabue, and J. M. Dickinson, for appellant.

J. B. Wickliffe, for appellee.

O'REAR, J. Appellant maintained a line of railway through appellee's farm. It was made up of a fill and a trestle throughout the length of from 15 to 17 feet high. The railroad is located some 2½ miles south of the Ohio river, and runs nearly parallel to it, and at the point complained of is about 5 miles from the mouth of the river. The country it traverses is low and flat, and subject to inundation when the Ohio and Mississippi rivers overflow. In March, 1903, there was an unusual stage of water in these rivers, which

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flooded the lowlands from 10 to 15 feet or more. Considerable quantities of logs, trees, and other drift were washed southward against the embankment of the line of railroad, much of which lodged against the trestle first mentioned. It was charged in the petition that appellee, in removing this drift and floating debris, did it so negligently and carelessly as to cause great quantities of it to lodge upon appellee's land, to his damage. In the course of the evidence it was shown that the most of the timber that was so floated over and lodged upon appellee's land was that which had been cut upon appellant's adjacent right of way, and which had for some months been allowed to lie there without attempting to remove it, or to destroy it so as to prevent its becoming a menace to property below in case of high water. It was clearly shown that this section was subject to frequent inundations, especially during the winter season, and therefore presumably within the knowledge of the residents and those doing business in that section, as appellant was. Although the act allowing the down timber to remain upon appellant's right of way at the point complained of was not one of the grounds of negligence set up in the petition, yet it was proven by the plaintiff below without objection, and evidence tending to rebut the fact was likewise introduced by appellant. Thus the question was tried by the parties as having been at issue, and was therefore not improperly submitted by the court to the jury in its instructions. The court properly told the jury that while, as to other timber floating upon the high waters that lodged against appellant's trestle, it had the right to pass it under or over its line of railroad without liability to adjacent owners who might be damaged by the fact, provided the act was done by the railroad company with ordinary care, yet that appellant did not have the right to cut and leave timber upon its own right of way, where it was liable to be floated out in large quantities upon adjacent property to its damage, and that for such the railroad company was liable, although it was not negligent in passing it beneath the trestle after it became afloat. We think this view of the rights of the parties was properly stated by the court.

Judgment affirmed, with damages.

 STATE v. BISPING.

(Supreme Court of Wisconsin, Nov. 15, 1904.)

[101 N. W. Rep. 359.]

Penal Offenses—Placing Obstructions on Railroad Tracks—Intent.

Rev. St. 1898, § 4386, is included in a chapter of the statutes dealing with "offenses against lives and persons of individuals," and provides that any person who shall willfully, maliciously, or wantonly

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place any obstruction on the track of any steam railroad in the state shall be punished by imprisonment, etc.: *held*, that the willful, malicious, or wanton placing of an obstruction on a railroad track constituted a completed offense under such section, regardless of whether the defendant in so doing was prompted by an intent thereby to prevent the safe running of trains or endanger human life.

Same—Same—Excessive or Unusual Punishment.

Rev. St. 1898, § 4386, prohibiting any person from placing obstructions on the track of a railroad under penalty of imprisonment not exceeding ten years nor less than one year, does not provide for excessive or unusual punishment.

Same—Same—Information—Immaterial Allegation.

An information for placing an obstruction on a railroad track charged that defendant did unlawfully, willfully, maliciously, and wantonly place an obstruction, to wit, a large stone weighing about 50 pounds, on the track of a specified steam railroad, "for the purpose of then and there unlawfully, maliciously, and wantonly destroying such railroad, contrary to the statute," etc.: *held*, that the clause quoted was not material to the charging of an offense under Rev. St. 1898, § 4386, prohibiting any person from placing an obstruction on steam railroad tracks within the state, and that, disregarding such clause as surplusage, the information stated an offense within the statute.

Appeal from Municipal Court of Milwaukee; A. C. Brazee, Judge.

Henry Bisping was convicted of placing an obstruction on a railroad track, and he appeals. Affirmed.

The defendant was tried in the municipal court for Milwaukee county upon an information alleging that he, on April 5, 1902, "did unlawfully, willfully, maliciously, and wantonly place an obstruction, to wit, a large stone weighing about fifty pounds, upon the track of the Chicago, Milwaukee & Saint Paul Railway Company, a corporation then and there existing and doing business, which was then and there a steam railroad, for the purpose of then and there unlawfully, maliciously, and wantonly destroying said railroad, contrary to the statute," etc. The case was submitted to a jury upon the evidence, who found the defendant guilty of the offense charged. Before any evidence was received, an objection was made to the reception of any evidence, because the information stated no offense under the law. This objection was overruled. After verdict, motions for a new trial and in arrest of judgment were made. Upon defendant's request all proceedings were stayed, and the court certified the following questions: "(1) Is the offense described in section 4386 of the Revised Statutes of 1898 limited to acts whereby the safe running of trains is prevented and human life endangered? (2) Does said section 4386 include the offense of placing an obstruction upon the track of any steam railroad in this state for the purpose of unlawfully, maliciously, and wantonly destroying said railroad? (3) Does the information in this case state offense under the provisions of said section 4386? (4) Ought the court to grant the motion in arrest of judgment made by the defendant after verdict?"

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(5) Can the court lawfully, upon the information and record hereby certified, proceed to sentence the defendant upon the verdict returned by the jury in this case?"

Hoyt, Doe, Umbreit & Olwell, for appellant.

L. M. Sturdevant, Atty. Gen., and Walter D. Corrigan, Second Asst. Atty. Gen., for the State.

SIEBECKER, J. (after stating the facts). The court in the first question propounds the inquiry: "Is the offense described in section 4386 of the Revised Statutes of 1898 limited to acts whereby the safe running of trains is prevented and human life endangered?" The section is as follows: "Any person who shall willfully, maliciously or wantonly place any obstruction upon the track of any steam, electric or cable railroad in this state or take up or displace a rail, switch or signal, or remove a spike, or otherwise injure, break down or destroy a bridge, road bed or other structure of such railroad shall be punished by imprisonment in the state prison not more than ten years nor less than one year." It is contended that, to constitute an offense as defined in this section by wrongfully placing an obstruction upon the track of a railroad, or in committing any of the other acts enumerated in the section, the act must be charged and found to be one which prevents the safe running of trains and endangers human life. Does the offense defined by the section include those elements as claimed? This must be determined from the contents of the statute, by an examination of its terms in view of the purpose the Legislature had in mind and which led to the adoption of the law. It is obvious from a reading of this section that the language employed is neither obscure in meaning nor indefinite in its application. Nor is there uncertainty as to what acts come within its provisions. We must be guided in its interpretation by the rule that, "if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument (or act), there is no occasion to resort to other means of interpretation." Sutherland Stat. Const. p. 312. Reading the statute in its literal sense, it is plain that the legislative intent was to make it an offense for a person willfully, maliciously, or wantonly to place an obstruction upon a railroad track, and that the offense is committed when this act is done, regardless of any intent which may have prompted him in the matter. The placing of the obstruction on the railroad track, or the doing of any of the other acts forbidden by the statute, constitutes and completes the offense. From this interpretation it must follow that the act complained of need not prevent the safe running of trains or endanger human life to constitute the offense charged. Nor does the offense include as a necessary ingredient that the obstruction be placed on the track or that any of the prohibited acts be committed "for the

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purpose of unlawfully, maliciously, and wantonly destroying said railroad." The language of the statute does not cover these elements, nor is it necessary to include them by construction to give the statute a reasonable significance and effect.

It is urged that the classification of the statute by placing it in the chapter of "offenses against lives and persons of individuals" evinces a legislative intent that the element of danger to human life must inhere in any of the acts to make them criminal. While classification of statutes by including them in a chapter under a general division of subjects may aid in ascertaining the legislative intent in cases where it is doubtful or uncertain, it cannot be held to overcome the obvious meaning of the language employed. Nor do we find any force in the contention that this interpretation of the section makes the offense in its character a malicious trespass, and therefore leaves it out of harmony and in conflict with sections 4440 and 4440a, Rev. St. 1898. A comparison of this section with the other sections cited reveals the fact that they cover different acts though they come within analogous fields.

It is also asserted that the degree of punishment prescribed by the section in question indicates that when the statute was framed it was contemplated that the acts constituting the offense should include only such as were necessarily dangerous to human life. We perceive nothing excessive or unusual in the punishment to be inflicted for the offense, in view of the serious consequences which may flow from the inhibited acts.

The third question certified is: "Does the information filed * * * state an offense under the provisions of section 4386?" The information sets out the acts charged in words of substantially the same meaning as those used in the statute, but adds the allegation. "For the purpose of then and there unlawfully, maliciously, and wantonly destroying said railroad." It is urged that this allegation is material in charging the offense to show that the particular offense charged related to an injury to property which was at the time in use for railroad purposes. We think the language employed charges and informs defendant fully of every fact essential to establish the offense without this allegation, which thus becomes surplusage. *State v. Siegel*, 54 Wis. 86, 11 N. W. 435. The allegation is wholly immaterial to the charge, and its insertion could in no way mislead or prejudice the defendant. The general rule is that surplusage does not vitiate the information, and should be stricken out unless it be so interwoven with material allegations that it cannot be so stricken out without carrying with it material parts of the charge. The allegation is in no way combined with or made part of a material one, and therefore it may be disregarded, and re-

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jected as surplusage. *Commonwealth v. Dyer*, 128 Mass. 70.

The motion in arrest of judgment should be denied, and the court should proceed to sentence. Nothing remains to be said in answering the questions certified.

The first, second, and fourth questions are answered in the negative, and the third and fifth questions are answered in the affirmative.

MAYOR & ALDERMEN OF JERSEY CITY v. JERSEY CITY & B. R. CO.

(Supreme Court of New Jersey, Nov. 7, 1904.)

[59 Atl. Rep. 15.]

Limitations—Contract to Pay Annual License.

The construction of its railroad by the defendant under the municipal consent that was required by statute, and that was given by the plaintiff upon condition that the defendant would pay to the plaintiff an annual license fee for each car run by the defendant on its road, constituted an obligation resting in contract to pay such fees, to the enforcement of which obligation by legal action the statute of limitations may be pleaded.

(Syllabus by the Court.)

Action by the mayor and aldermen of Jersey City against the Jersey City & Bergen Railroad Company. Demurrer to plea overruled.

Argued June term, 1904, before GUMMERE, C. J., and GARRISON and SWAYZE, JJ.

George L. Record and Gilbert Collins, for plaintiff.

Sherard Depue, Frank Bergen, and Richard V. Lindabury, for defendant.

GARRISON, J. This is a demurrer to the plea of the statute of limitations. The broad ground of demurrer is that the cause of action displayed by the declaration is not founded upon contract. The action set out in the declaration is for the recovery of the annual license fees prescribed by plaintiff's common council as the condition upon which its consent to the construction of the defendant's railroad was given. This declaration, when attacked by demurrer at a prior term, was sustained by this court upon the ground that the defendant, by accepting the consent of the plaintiff upon the terms on which that consent was conditioned, came under a legal obligation to pay these license fees. *Jersey City v. Jersey City & Bergen Railroad Co.* (N. J. Sup.) 57 Atl. 445.

The result of the premises which are fully stated in that opinion and of the reasoning upon which the decision was based, is that the defendant, by constructing its railroad under a consent of the plaintiff that was required by statute, and that was given upon condition that the defendant would pay

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to the plaintiff an annual license fee for each car run by the defendant on its road, incurred a legal obligation resting in contract to pay such fees. This conclusion, which, upon the same premises, we have reached, is at once the basis of the plaintiff's right to recover the fees so agreed to be paid, and of the defendant's right, when sued upon its said obligation, to interpose by plea the statute of limitations.

Judgment upon demurrer is given for the defendant.

The case of the same plaintiff against the Consolidated Traction Company is disposed of by this decision, and a similar judgment may be entered in that case.

CHICAGO, B. & Q. R. CO. v. PEOPLE ex rel. GRIMWOOD et al.
(Supreme Court of Illinois, Oct. 24, 1904.)

[72 N. E. Rep. 219.]

Drains—Application of Statute.

Farm Drainage Act (Hurd's Rev. St. 1901, p. 723, c. 42) § 78, provides that "this act and this repealing section shall not affect other independent laws for drainage and levees not herein mentioned, but shall be construed as an independent act not affecting other independent drainage laws except as it is a codification and amended successor to the first three acts mentioned in the repealing section and the special provisions of this act for their own class of districts shall apply only to such districts, but the general provisions applicable to districts shall apply to all districts provided for in this act:" *held* to apply only to the various provisions of the farm drainage act, and not to affect the levee act (Hurd's Rev. St. 1901, p. 770, c. 42) so as to make section 56, which is of a general nature, applicable to proceedings under the farm drainage act.

Same—Railroad Bridges—Constitutionality of Statute.*

It being the common-law duty of a railroad company to make such necessary changes in its bridge across a natural water course as will accommodate the waters which drain through the same though the flow be increased by artificial improvements, requiring it to do so under the provisions of the farm drainage act (Hurd's Rev. St. 1901, p. 687) does not invade any constitutional provision against the taking of property without due process of law or without just compensation.

Appeal from Circuit Court, Kendall County; Geo. W. Brown, Judge.

Petition for mandamus, on the relation of one Grimwood and others, against the Chicago, Burlington & Quincy Railroad Company. The writ was ordered as prayed on demurrer to the petition, and defendant appeals. Affirmed.

Appellees, the drainage commissioners of Drainage District No. 1 of the town of Bristol, Kendall county, filed their petition for a writ of mandamus directed to appellant, re-

*See foot-note appended to Illinois Cent. R. Co. v. Swalm (Miss.), 11 R. R. 118, 34 Am. & Eng. R. Cas., N. S., 118, where all the preceding authorities in this series are collected.

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quiring appellant to construct, enlarge, deepen, and widen the waterway over and across the right of way of appellant, and to construct a railroad bridge across the waterway so widened and deepened along appellant's railroad. Appellant demurred to the petition. The demurrer was overruled, and appellant elected to stand by its demurrer, and the writ was ordered as prayed. From this order appellant appealed.

Appellees are organized under the farm drainage act, and have adopted the bed of Rob Roy creek as the main drain for the lands of the district. The district includes about 2,000 acres of land, the majority of which is swamp and slough land, which lands, owing to overflow and the continuous presence of water, have, up to the time of the organization of the district, been unfitted for cultivation. Rob Roy creek runs in a southeasterly course through the district and across the appellant's railroad, a portion of the district lying upon each side of the railroad. The creek is a natural waterway, and has been, as alleged in the petition, a natural water course for more than 50 years, and is the natural and only outlet for the land included in the drainage district; and the petition alleges that by the proposed system of drainage no water, other than the water that has its natural drainage into Rob Roy creek, will be carried through the same, and that by the deepening and enlarging of the creek all the lands in said district will be greatly improved, and made good, tillable lands subject to cultivation. The petition further avers that appellant is a railway corporation doing business in this state, with corporate power to build, construct, operate, and maintain a railroad at and in the township and county aforesaid; that more than 40 years ago appellant constructed a bridge or culvert across Rob Roy creek of the length of 12 feet and of the width of 30 feet, and has continuously owned and used the same from thence hitherto, and that in the construction of said bridge appellant sank and placed in the said Rob Roy creek huge wooden timbers and stone, which it has ever since kept and maintained there, thereby preventing the deepening of said creek by petitioners, as aforesaid, except by the removal of said timbers and stone, and which, if removed, would result in the destruction of said bridge; that the channel so left under the said bridge has, from the time of its construction to the present time, remained at the depth of three feet, and that it is now insufficient to allow the flow of water in the ditch or drain which is proposed to be dug, built, and constructed by the petitioners in their capacity as drainage commissioners; that the said ditch or proposed drain is to be an open ditch as the main waterway for said system of drainage. The petition further shows that on the 24th of June, 1903, appellees gave notice to appellant to construct or enlarge the opening at the intersection of its said railroad with Rob Roy creek, for the uses and purposes of said drain, so as to conform and be equal

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in size to the same, and of the following dimensions: Width, 23 feet; depth, 9½ feet below the surface of the ground underneath the bridge or culvert at the place of intersection; and by the petition a copy of the notice is made an exhibit thereto and a part thereof. The notice referred to is addressed to the appellant, and is as follows:

"You are hereby notified that a bridge is deemed necessary to be made across the right of way of your company at a place or point in section 17, in the said town of Bristol, where the right of way of your said company is crossed or intersected by what is commonly known as the 'Rob Roy Ditch,' said construction or improvement to be for the use or waterway of a combined system of drainage being constructed in the vicinity under the charge and direction of the drainage commissioners of District No. 1 in the town of Bristol, county of Kendall and state of Illinois, the main ditch of said drainage where it intersects the right of way of your said company at said point being of the width of twenty-three feet and the depth of nine and a half feet, the bridge so to be constructed to be of the width of twenty-three feet in the clear at surface or level of land, and to permit at least sixteen feet in the clear at the bottom of the ditch; and you are hereby required, in pursuance of the statute in such case made and provided, to build and construct such bridge within thirty days from this date."

The petition avers that the present bridge across the said Rob Roy creek is of the value of \$8,000, and that a new bridge of the dimensions required for the accommodation of the ditch as improved will cost not to exceed \$13,000, and that 30 days have elapsed since the giving of the notice to appellant, and that appellant has neglected, failed, and refused to construct and enlarge, in accordance with said notice, the opening under said bridge or culvert.

The demurrer was general, with certain special grounds assigned, as follows: First, that the proceeding is repugnant to section 2 of article 2 of the Constitution of the state of Illinois, in that petitioners seek thereunder to deprive this defendant of property without due process of law; second, the statutes under which petitioners are proceeding are repugnant to section 13 of article 2 of the Constitution of the state of Illinois, in that petitioners seek thereunder to take and damage the private property of the defendant for public use without just compensation; third, the statutes under which petitioners are proceeding are repugnant to section 13 of article 2 of the Constitution of this state, in that petitioners seek to take property of defendant, a corporation, and subject the same to the uses and conveniences of petitioners, without an assessment of the damages that will necessarily be sustained by the defendant, and without awarding to the defendant a trial by jury; fourth, the statutes under which the petitioners are proceeding are repugnant to the fourteenth

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amendment to the Constitution of the United States, in that thereunder the petitioners seek to deprive defendant of property without due process of law; and, fifth, the statutes under which petitioners are proceeding are repugnant to the fourteenth amendment to the Constitution of the United States, in that thereunder the defendant is denied the equal protection of the laws.

Hopkins, Dolph & Scott (Chester M. Dawes, of counsel), for appellant.

Raymond & Newhall, for appellees.

RICKS, C. J. (after stating the facts). Of the grounds relied upon by appellees to sustain the writ awarded, are, *inter alia*, section 40½ of the farm drainage act and section 56 of the levee act.

Section 40½ of the farm drainage act is as follows: "The commissioners shall have the power and are required to make all necessary bridges and culverts along or across any public highway or railroad which may be deemed necessary for the use or protection of the work, and the cost of the same shall be paid out of the road and bridge tax, or by the railroad company as the case may be: provided, however, notice shall first be given to the road or railroad authorities to build or construct such bridge or culvert, and they shall have thirty days in which to build or construct the same, such bridges or culverts shall in all cases be constructed so as not to interfere with the free flow of water through the drains of the district. Should any railroad company refuse or neglect to build or construct any bridge or culvert as herein required, the commissioners constructing the same may recover the cost and expenses therefor in a suit against said company before any justice of the peace or any court having jurisdiction, and reasonable attorneys' fees may be recovered as part of the cost. The proper authorities of any public road or railroad shall have the right of appeal the same as provided for individual land owners." Hurd's Rev. St. 1901, p. 723, c. 42.

Section 56 of the levee act reads: "When any ditch or drain or other work of enlarging any channel or water-course is located by the commissioners on the line of any natural depression or water-course, crossing the road of any railroad company where no bridge or culvert or opening of sufficient capacity to allow the natural flow of water of such ditch or water-course, is constructed, it shall be the duty of the commissioners to give notice to such railroad company to construct or enlarge such bridge or culvert or opening in the grade of such road, for such ditch or ditches or other work, of the dimensions named in such notice, within twenty days from the service thereof; and any railroad company neglecting, failing or refusing so to do, shall be liable to any owner of land in such district, for all damages to such land sus-

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tained by such neglect or refusal; and shall be liable to such district in the sum of twenty-five dollars (\$25) for each day such company shall have neglected or refused to construct such work, after the time fixed in such notice for constructing the same shall have expired, which damages or penalty may be recovered before a justice of the peace, if within his jurisdiction, or before any court of competent jurisdiction." Hurd's Rev. St. 1901, p. 707, c. 42.

Of these acts appellant says that both are repugnant to the various constitutional provisions set forth in its demurrer, and that, if it be conceded that they are valid laws, section 56 of the levee act could have no application to this proceeding; that the Legislature has enacted two entirely separate and independent Codes of law applicable to the subject of drainage and the organization and government of drainage districts; that one is known as the "Levee Act" and the other as the "Farm Drainage Act"; and that a district organized under the one is subject only to the provisions of that act, and those of the other act have no application to such district. In this latter contention we agree with appellant, and deem the question fully settled by the cases of *Gauen v. Drainage District*, 131 Ill. 446, 23 N. E. 633, *Drainage Commissioners v. Volke*, 163 Ill. 243, 45 N. E. 415, and *McCaleb v. Coon Run Drainage District*, 190 Ill. 549, 60 N. E. 898.

Appellees now urge that section 78 of the farm drainage act, which is the repealing clause or section of that act, makes the sections of the levee act of general application and applicable to the farm drainage act. The language relied upon is as follows: "This act and this repealing section shall not affect other independent laws for drainage and levees not herein mentioned, but shall be construed as an independent act, not affecting other independent drainage laws except as it is a codification and amended successor to the first three acts mentioned in the repealing section, and the special provisions of this act for their own class of districts shall apply only to such districts, but the general provisions applicable to all districts shall apply to all districts provided for in this act."

We are unable to see that the section relied upon can be given the effect that appellees urge it shall have. The farm drainage act provides for various kinds of districts, namely, districts for combined drainage (section 11), subdistricts (section 43), union districts (section 48), special drainage districts (section 49), river districts (section 75), districts by user (section 76), and districts by mutual agreement; and the effect of the repealing clause relied upon is that the provisions relating to these various districts shall apply only to them, but that the provisions of a general nature, that are applicable to "all districts, shall apply to all districts provided for in this act." This latter provision can have no reference to the levee act or any provision in it, but, as we construe it, applies

only to the various provisions of the farm drainage act. There are many provisions of a general nature in the farm drainage act that are not repeated under the various special provision in that act for the specified districts. Such is the provisions that bridges shall be made across the drainage ditches in inclosed fields. This provision, by the last clause of the repealing act, and the one now relied upon by appellees, is by that section read into all of the various kinds of districts that may be organized under the act.

The right of drainage through a natural water course or a natural waterway is a natural easement appurtenant to the land of every individual through whose land such natural water course runs, and every owner of land along such water course is obliged to take notice of the natural easement possessed by other owners along the same water course. For the drainage of large areas of land, drainage districts were authorized by the Constitution to be provided for by proper legislative action. But the constitutional amendment was not solely to authorize drainage along the lines of natural water courses. The constitutional provision was an express declaration of the people of the right of one man to drain his land over and across the lands of another. It was the declaration of the people of the policy of the state that in a country such as this the rights of drainage of the lands, where such large proportions were swamp and overflowed lands, were paramount to the right of the individual who sought to deny such drainage.

The amendment of 1878 of the Constitution, in relation to drainage (article 4, § 31), was not for the purpose of declaring the right of drainage, but was for the purpose of authorizing special assessments upon property benefited thereby. Where lands are valuable for cultivation, and the country, as this, depends so much upon agriculture, the public welfare demands that the lands shall be drained, and, in the absence of any constitutional provision in relation to such laws, they have been sustained, upon high authority, as the exercise of the police power. Upon this subject Mr. Cooley, in his work on Constitutional Limitations (7th Ed., p. 868), says: "Where, under legislative authority, the construction of levees and embankments is required to protect from overflow and destruction considerable tracts of country, assessments are commonly levied for the purpose on the owners of lands lying on or near the streams or bodies of water from which the danger is anticipated. But if the construction should be imposed as a duty upon residents or property owners in the neighborhood, so that they should be compelled to turn out periodically or in emergencies and give special attention and labor to the construction of the necessary defenses against overflow and inundation, it is not perceived that there could be any difficulty in supporting such a regulation as one of police, or of resting it upon the

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same foundations which sustain the regulations in cities by which duties are imposed on the occupants of buildings to take certain precautions against fires, not for their own protection exclusively, but for the protection of the general public. Laws imposing on the owners the duty of draining large tracts of land which in their natural condition are unproductive and are a source of danger to health may be enacted under the same power, though, in general, the taxing power is employed for the purpose; and sometimes land is appropriated under the eminent domain."

A natural water course, being a natural easement, is placed upon the same ground, in many respects, as to the public right, as is a public highway. At the common law, if a railroad or another highway crosses a natural water course or a public highway, such highway or railroad must be so constructed across the existing highway or waterway, and so maintained, that said highway or waterway, as the case may be, shall not only subserve the demands of the public as they exist at the time of crossing the same, but for all future time. In *Ohio & Mississippi Railway Co. v. Thillman*, 143 Ill. 127, 32 N. E. 529, 36 Am. St. Rep. 359, in speaking of the duty of railroads crossing streams, it is said (page 133, 143 Ill., page 530, 32 N. E., 36 Am. St. Rep. 359): "A railroad company, in constructing its road over water courses, must make suitable bridges, culverts, or other provisions for carrying off the water effectually. Angell on Water Courses (7th Ed.) § 465b. The duty imposed by statute upon such company to restore the stream crossed to its former state, or to so restore it as not to impair its usefulness, exists also in the absence of express statutory requirement. *Pierce upon Railroads*, p. 203. The same obligation in such case rests upon the corporation as rests upon a private owner who undertakes to interfere with the water course in the same way."

In *Kankakee & Seneca Railroad Co. v. Horan*, 131 Ill. 288, 23 N. E. 621, in speaking of the contention of the railroad company that the court erred in refusing to give an instruction requested by it, it is said (page 308, 131 Ill., page 626, 23 N. E.): "It, in substance, tells the jury that the appellant, when fixing the culvert for the passage of the water of the Parker slough, a natural water course, was only bound to so construct it that it was no obstruction to the water then flowing into it; but, as to any increase of water caused by the drainage into it by people along the course of the slough, the appellant would not be liable, though the culvert was not sufficient to admit of the passage of such water. We do not subscribe to this doctrine. The Parker slough was a water course, and it was the legal right of any one along its line, for miles above the railroad, where the water naturally shed toward the slough, to drain into it, and no one below, owning land along the slough, would have any legal remedy against such person so draining water into the slough above

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him for any damage done to his inheritance by means of an increased flow of water caused thereby. In other words, the slough was a legal water course for the drainage of all the land the natural tendency of which was to cast its surplus water, caused by the falling of rain and snow, into it, and this whether the flow was increased by artificial means or not. It would seem legitimately to follow that the railroad company, in providing a passageway for the slough, was bound to anticipate and provide for any such legal increase of the water flow. If it did not, it was doing a wrong and legal injury to any one, situated like the appellee, who received injury in consequence of a failure on its part to do its duty."

In *Cleveland v. City Council of Augusta* (Ga.) 29 S. E. 584, 43 L. R. A. 638, this language is used: "At common law the rule is that, where a highway is made across another one already in use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary to the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way."

In the case of *Lake Erie & Western Railroad Co. v. Cluggish*, 143 Ind. 347, 42 N. E. 743, it is said: "The duty of a railroad company to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public."

In the case of *Lake Erie & Western Railroad Co. v. Smith* (C. C.) 61 Fed. 885, this language is used: "The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public. *Cook v. Railroad Corp.*, 133 Mass. 185. Under a fair construction of section 3903, Rev. St. Ind. 1881 (section 5153, Burns' Ann. St. Ind. 1894), it is the duty of a railroad company to construct its road, when it intersects any highway or stream, in such manner as to afford security for life and property, and this is so whether the way is laid out and opened before or after the construction of the railroad. *Railway Co. v. Smith*, 91 Ind. 119; *National Waterworks Co. v. City of Kansas* (C. C.) 28 Fed. 921."

In *State of Indiana v. Lake Erie & Western Railroad Co.* (C. C.) 83 Fed. 287, it is said: "If, by the growth of population or otherwise, the crossing has become inadequate to meet the present needs of the public, it is the duty of the railroad

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company to remedy the defect by restoring the crossing so that it will not unnecessarily impair the usefulness of the highway."

In *State v. St. P., M. & M. Ry. Co.*, 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313, a railroad company had crossed a public street in the city, and had so obstructed the street with tracks that it became necessary to lower the street or elevate the railroad. The city council determined to lower the street, and notified the railroad company to make the street under its roadway, and the city would make the depression approaching the underneath crossing. The court, in that case, discussing the duty of railroads crossing existing streets, says: "The duty prescribed is to keep, at all times and under all circumstances, the street, at points where they are intercepted by the railroad, in a condition and state of repair so as not to impair or interfere with their free and proper use, and, if this cannot be done with a surface crossing, the company must do it either by carrying their tracks over or under the highway, or the highway under or over their tracks; and the duty of thus restoring or preserving the free use of the street includes the doing of whatever is needed to accomplish the required end, and which is rendered necessary to be done by reason of the presence of the railroad in the street." And it was held in that case that it was not only the duty of the railroad company to prepare a crossing for the street under its railroad tracks, but it was proper to require it to prepare the depressions or approaches in the street approaching the crossing under the tracks.

The question whether, where no street exists or a drain ditch crosses territory where there is no natural waterway, a railroad can be required, without compensation, to devote a part of its right of way to the public for either a highway or a ditch, is not before us, and we do not decide, but we think that the great weight of authority is that where there is a natural waterway, or where a highway already exists and is crossed by a railroad company under its general license to build a railroad, and without any specific grant by the legislative authority to obstruct the highway or waterway, the railroad company is bound to make and keep its crossing, at its own expense, in such condition as shall meet all the reasonable requirements of the public as the changed conditions and increased use may demand.

The case of *Chicago & Northwestern Railway Co. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109, was a condemnation for the extension of a street in the city of Chicago across the right of way of the railroad company. The damages assessed to the company for land taken was \$1. The company offered for land taken was \$1. The company offered to show the expense of grading and planking the roadway, the making of a gate and a power house from which to operate the same, the salary of a tender, and the cost of repairs, and insisted that

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all of these matters were proper elements of damage for land not taken. The lower court denied the contention, and this court sustained its judgment, and said (page 323, 140 Ill., page 1113, 29 N. E.): "These items of expense are set up in the cross petition as damages to the property not taken—that is, to the right of way on either side of that portion of the right of way which is to be used as a street. How can grading the approaches, planting the crossing, and erecting gates damage the right of way adjoining the street crossing? The expenses which they necessitate may require a deduction from the revenues of the company, but there is no proof to show that there is any such injury or inconvenience as reduces the capacity of the corporation to transact its business. Not the grading or planking or gates, but the use of the crossing by the public, may result in the stoppage or slower movement of trains and in the increased danger of accidents, but we have held that no damages can be allowed for these inconveniences. (Citing authorities.) Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging, without just compensation, of private property or of private property affected with a public interest." In *Illinois Central Railroad Co. v. Willenborg*, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862, it was held that the statutory requirement for railroads to construct farm crossings for the use of adjoining landowners was the exercise of the police power, and that such statute was applicable alike to railroads built before and after its passage. To the same effect as the foregoing cases are *Chicago & Northwestern Railway Co. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109; *Ohio & Mississippi Railroad Co. v. McClelland*, 25 Ill. 140; *Chicago, Rock Island & Pacific Railroad Co. v. Moffitt*, 75 Ill. 524; *People v. Chicago & Alton Railroad Co.*, 67 Ill. 118.

Most of the foregoing cases are upon the common-law duty of railroads to keep highways and waterways over which they cross in such condition as will meet all public requirements, and the duty in such cases is treated as a continuing duty. Those cases not based upon the common-law duty are where statutes have been enacted for their regulation under the police power of the state, or where statutes merely declaratory of the common-law duty in such cases have been enacted. If it is the common-law duty of appellant to make the necessary changes in its bridge and opening across Rob Roy creek as will accommodate the waters which naturally drain through the same, although the flow be increased by artificial means, if the statute in question is but declaratory of the common-law duty, or is the exercise of the police power, then it is clear that there is no such taking of appellant's property as invades the various provisions of the Constitution relied upon in the demurrer. The power exercised would not be that of eminent domain.

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"The police power is to be clearly distinguished from the right of eminent domain, and the distinction lies in this: that in the exercise of the latter right private property is taken for public use and the owner is invariably entitled to compensation therefor, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare of the public, and in neither case is the owner entitled to any compensation for any injury which he may sustain in consequence thereof, for the law considers that either the injury is *damnum absque injuria*, or the owner is sufficiently compensated by sharing in the general benefits resulting from the exercise of the police power." 22 Am. & Eng. Ency. of Law (2d Ed.) 916; *Frazer v. City of Chicago*, 186 Ill. 480, 57 N. E. 1055, 51 L. R. A. 306, 78 Am. St. Rep. 296.

In the case at bar it is not proposed to take the property of appellant, but the proposition is that appellant shall be required, in the use of its property, to conform to the public needs. The operation of its railroad or its charter rights are not to be interfered with. While its charter is not set out in the petition, and its exact provisions are not before us, the presumption will be that its charter is such as is ordinarily granted to construct and operate a railroad between the points therein mentioned. The allegation of the petition is that appellant was organized "with corporate power to build, construct, operate and maintain a railroad at and in the township and county aforesaid," and there is no presumption that it had any greater powers than those set forth in the petition. As said in *Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179: "When a franchise is granted to construct ways or streets across a waterway, there is no implied right to destroy the waterway, but it must be so bridged that its use will not be unnecessarily impaired. *Elliott on Roads and Streets*, 32. If it be conceded that the state may authorize the taking or destruction of a waterway, it devolves on those who claim that the state has done so to show it, and, since that is not done by simply showing power to lay out, open, and improve streets across waterways, no such power is here shown." And while to conform to the writ awarded in this case may, as was said in *Chicago & Northwestern Railroad Co. v. City of Chicago*, *supra*, "require a deduction from the revenues of the company," it does not interfere with the exercise of its rights under its charter or any of its charter rights.

Appellant has cited and relies upon *Bailey v. Philadelphia, etc., Railroad Co.*, 4 Har. 389, 44 Am. Dec. 593, and *Washington Bridge Co. v. State*, 18 Conn. 53. We have examined those cases and do not think they apply. In the

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first case mentioned, the charter was to locate and construct a railroad between Philadelphia and Baltimore, and, if it should be necessary to pass over any navigable stream, a sufficient draw was required to be made in each bridge for the passage of vessels. The railroad company built a bridge with a draw. Subsequently the Legislature amended the charter of the railroad company, authorizing it to build a closed bridge where it had theretofore had a bridge with a draw. The closed bridge was accordingly built in compliance with the terms of the charter. Subsequently an act was passed giving damages to landowners that might be sustained by reason of said bridge being constructed without any draw or passage thereunder. The court held that, inasmuch as the defendant had complied with the special provisions of its charter, it had vested rights, and was not liable to the action authorized by the subsequent statute.

The case of *Washington Bridge Co. v. State*, supra, was where a corporation was created by the Legislature for the purpose of constructing a permanent bridge over the Housatonic river, with authority to collect tolls to reimburse the expense of building the bridge. It was provided that as soon as such expense, with interest at 12 per centum, should be reimbursed from the tolls, the bridge and the right of tolls should be subject to such order and regulation as the General Assembly should deem proper. Until that time arrived there was no reservation of power. The charter required the company to build a bridge with a 32-foot draw. Before the bridge had been operated a sufficient time for the company to reimburse itself and to realize the interest provided for in the act, the General Assembly passed an act requiring the bridge company to make its draw 50 feet, and it was held that, the bridge company having built its bridge according to the provisions of its charter, the charter was a contract between the state and the company, under which the company had vested rights.

It would seem manifest that these cases cannot be controlling in the base at bar, where, so far as appears from the pleadings, appellant was given no authority, except the implied authority, to build any bridge whatever. That implied authority was coupled with the common-law duty of appellant to build its bridge over the natural water course, with a view of the future as well as the present contingencies and requirements of such water course, and with the further implied provision that there remained in the state, whenever the public welfare required it, the right to regulate its use. *Ohio & Mississippi Railroad Co. v. McClelland*, supra.

That the state is vitally interested in the reclamation of its swamp and slough lands cannot be gainsaid. We all know that the presence of large bodies of stagnant water, such as are found in swamp lands in this state, produce malaria and

breed disease-giving germs of various forms, and that the removal of such bodies of water is conducive to the health and welfare of the public. By the removal of such bodies of water and the subjection of such lands to cultivation they are made to bear their proper proportionate burden to the support of the inhabitants and the commerce of the state. Their value is increased, and thereby their contribution in taxes to the state and local governments is increased. The subject was deemed of such importance that the people, by section 31 of article 4 of the Constitution of 1870, conferred upon the General Assembly plenary powers in making provision for drainage for agricultural and sanitary purposes, and pursuant to that power the General Assembly passed the act under which the appellees are proceeding, declaring that the organization should be for agricultural and sanitary purposes. The drainage districts, organized as are the appellees, under that law are invested with the right of eminent domain and the power of taxation, upon the theory that they are public utilities and are held to be quasi public corporations. In their organic character they do not represent merely the individual property owners or themselves, but they represent the state in carrying out its policy, as found in the common law and declared by its Constitution and statutes. It has been so often said that it need only be adverted to here, that corporations such as appellant do not hold their property and exercise their franchises strictly in a private right, but that from the nature of their business and their relation to society they are public corporations in a sense and are subject to public control and regulation, though, with their grant of power to traverse the state with their lines of railroad, it cannot be said that their right of private property attaches to every highway and watercourse over which their roads may be constructed. To so hold would render such enterprises, which are designed for the benefit of the state, obstacles to its progress and a menace to its general welfare. *Ohio & Mississippi Railroad Co. v. McClelland*, supra. Of course, in the exercise of the right of the public interest as against such corporations, the demand must be reasonable and must clearly appear to be for the public welfare. In this case it is not questioned that the improvement of Rob Roy creek, as proposed, is necessary for the proper drainage of the lands comprising the drainage district. The petition alleges that such enlargement is necessary, and that the same cannot be carried on with the obstructions placed in the bed of said creek by appellant. This the appellant does not deny.

Appellant contends that there is a variance between the notice served upon it and the prayer of the petition, and argues that it has an exclusive right of way of much greater width than its bridge that is asked to be removed and replaced, and that the notice to construct a new bridge and re-

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move the obstructions in the waterway is not broad enough to cover the prayer and order of the writ. We have examined the petition, and there is no averment as to the width of appellant's right of way, and we are unable to say, from the proceedings before us, that when appellant has complied with the notice attached to the petition the waterway will not be improved all that is necessary for the proper passage of the waters of the district. Entertaining the views above expressed, and founding our conclusion upon the rights and duties of the parties as found in the common law, we deem it unnecessary to pass upon the constitutionality of section 40½ of the farm drainage act. We think the order for the writ was warranted under the petition and demurrer thereto, and the judgment awarding the same is affirmed. Judgment affirmed.

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(Supreme Court of Tennessee, Feb. 2, 1904.)

[78 S. W. Rep. 1098.]

Injury to Passenger—Defective Track—Evidence—Similar Accidents.*

In an action against a street railway company for injuries sustained by a passenger by being thrown from his seat in the car owing to a sudden jolting of the car caused by a defective frog in the track, it appearing that for several months the track at that point had been in the same condition as at the time of the accident, it was proper to admit the testimony of witnesses that they had nearly been thrown from the car at that point on previous occasions, and the testimony of a witness that he had seen cars derailed at that point and helped to put them back on the track.

Same—Same—Contributory Negligence—Imputed Negligence of Parents.†

A child was sitting in a street car holding on to the guard attached to the seat, and not leaning out or committing any incautious act, when, owing to a plunging of the car caused by a defect in the track, he was thrown off. His mother was facing him on the opposite seat at the time of the accident: *held*, that the child was not guilty of any negligence, and hence no negligence of the mother could be imputed to him.

Same—Instructions.

Where, in an action against a street railroad for injuries to a passenger, the court did not charge that a carrier of passengers must provide for their safety so far as human skill and foresight will go, it was not error to refuse to instruct as to the meaning of the terms "human skill and foresight."

*See foot-note appended to *Nelson v. Union R. Co.* (R. I.), 12 R. R. 633, 35 Am. & Eng. R. Cas., N. S., 633.

†Imputed negligence, see foot-note appended to *Duval v. Atlantic Coast Line R. Co.* (N. Car.), 11 R. R. R. 235, 34 Am. & Eng. R. Cas., N. S., 235.

As to what constitutes contributory negligence on the part of parents, see foot-note appended to *St. Louis, I. M. & S. Ry. Co. v. Colum* (Ark.), 11 R. R. R. 807, 34 Am. & Eng. R. Cas., N. S., 807, where all the preceding authorities in this series are collected.

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Same—Same—Degree of Care—Track and Appliances.†

In an action against a street railway for injuries to a passenger owing to a defective track, defendant could not complain of the fact that the court only charged on its duty to keep its track and appliances in a reasonably safe order and condition.

Appeal from Circuit Court, Davidson County; Jno. W. Childress, Judge.

Action by Edgar M. Howard by W. A. Howard, his next friend, against the Nashville Railroad. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. M. Anderson, for appellant.

Washington, Alien & Roins, for appellee.

McALISTER, J. W. A. Howard, as next friend to his minor son, E. M. Howard, recovered a verdict and judgment in the circuit court of Davidson county against the defendant railroad company for the sum of five thousand dollars (\$5,000) as damages for injuries to the son. The company appealed, and has assigned errors.

The cause of action, as outlined in the declaration, is that the plaintiff, a minor, four years of age, took passage with his mother and sister on one of defendant's cars, for the purpose of returning to his home in Northeast Nashville; that at the intersection of Meridian and Foster streets, by reason of the defective rails and switchboard or frog, and the track thereunder, as well as the careless and negligent handling of the car by the motorman, a sudden jerk or jolt was caused, throwing plaintiff from his seat violently to the ground, and so mangling and crushing one of his legs that its amputation was necessary.

The facts are that on the 21st of November, 1900, the plaintiff, in company with his mother and sister, boarded an open Meridian street car on the public square, occupying the second seat from the front, the child being seated between his mother and sister. When the car reached the bridge, the child, indulging a natural instinct to view the river, moved across to the seat immediately in front, facing his mother, and with his back to the motorman. The child sat near the end of the seat on the left of the car, and took hold of the guard on the end of the seat with his right hand. In this position he was sitting near and readily accessible to his mother and sister. He remained in this position until he was thrown from his seat to the ground at the intersection of Foster and Meridian streets. When nearing this point the

†As to the care required of a railroad, as a carrier of passengers, to furnish a safe track, see monograph, 2 R. R. R. 776, 25 Am. & Eng. R. Cas., N. S., 776; monograph, 4 R. R. R. 536, 27 Am. & Eng. R. Cas., N. S., 536; Louisiana & Northwest R. Co. v. Crumpler (C. C. A.), 8 R. R. R. 261, 31 Am. & Eng. R. Cas., N. S., 261; Galligan v. Old Colony St. Ry. Co. (Mass.), 6 R. R. R. 896, 29 Am. & Eng. R. Cas., N. S., 896 (degree of care required to prevent fall upon track of material from embankment).

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mother rang the bell for the car to stop in front of her house, but the motorman, without observing the signal, failed to stop, and continued on around the curve leading to Meridian street, and when the car wheels struck the frog at the point where the curve began, in the language of the conductor, "there was a plunging jerk, like the track going down and the car up." The result of this jerk, as already stated, was to throw the child from his seat to the track, and, before he could be rescued, the wheels ran over his foot and leg. There is evidence tending to show that the sudden plunging jerk and jar of the car was owing to the defective track. The proof of the plaintiff shows that the rails were lower than the frog, and that there were open joints or spaces between the ends of the rails and the frog, and the rails were loose on both sides of the frog, and were not in alignment with the frog rail, so that when the car passed from the rail to the frog, and from the frog to the next rail, it caused a plunging jerk and jar of the car that was both unusual and dangerous. It is further shown that this had been the condition of the track for several months prior to the injury to the defendant in error.

It is conceded by counsel for plaintiff in error there is evidence tending to show that at the place of the accident the track was in a defective, unsafe, and dangerous condition; while the defendant company introduced a number of witnesses who testified that the track was in a safe condition, and the only jolting or jerking of the car was such as was necessarily incident to passing through the frog or switch. It is conceded by counsel that in this conflict of evidence this court would not undertake to disturb the finding of the jury on the facts touching the defective character of the track.

The first assignment of error is that the court below erred in admitting the testimony of the witness Sloan to the effect that previous to the accident he had on several occasions been nearly thrown from the car at the same point. Sloan, it appears, was the conductor on the car at the time of the accident, and had been running as conductor for months prior to that time. He stated that in turning that curve on the occasion of the accident there was a kind of plunging jerk, like the track going down and the car up. The witness further stated there were times when he himself would have been thrown off if he had not been holding.

In this connection will be considered the second assignment of error, in which it is insisted that the court erred in permitting Dr. Frost to testify that previous to this accident he had seen cars derailed at this point, and had helped to put them back on the track, and that this had occurred more than one time.

The third assignment of error is that the court erred in admitting the testimony of A. B. Vaughn to the effect that previous to the accident, while attempting to leave the car

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at the place of the accident, he came near being thrown off.

These assignments of error raise cognate questions, and will be considered together.

It is insisted that this evidence was improperly admitted, because it adduced collateral facts and issues, which were incapable of affording any reasonable presumption or inference as to the particular fact or matter in dispute.

We find, upon examination of the testimony of these witnesses, that this railroad track had been in this condition for 8 or 10 months prior to and up to the date of the injury. It is shown that there had been no changes whatever in the condition of the track.

In *Railroad Co. v. Lindswood*, 109 Tenn. 411, 412, 74 S. W. 113, we approved the following rule:

"While in negligence cases the condition of the appliances or premises at the time or place of injury is the material inquiry, evidence of conditions before or after the accident may be received, where it is also shown that the conditions testified to remain unchanged down to the occurrence of the injuries or to the time to which the evidence relates. So evidence is admissible of conditions existing so short a time before or after the accident as, under the circumstances, to warrant an inference of fact that the same conditions existed when the injuries were received."

It is also settled by the weight of authority that evidence of prior injuries to other persons under the same circumstances as those which produced plaintiff's injuries is frequently admitted to show the defendants' actual knowledge of the defective or dangerous conditions or appliances, or as demonstrating the fact that defendants should have anticipated injuries, and were therefore negligent. 21 Amer. & Eng. Ency. of Law (2d Ed.) p. 519.

It must, of course, in all cases be shown that the conditions at the time of the other accident and the one directly involved in the litigation were substantially the same. *Id.* 520; *District of Columbia v. Arms*, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618.

The evidence presented herein shows that the condition of the track at the time specified by the witnesses was substantially the same as its condition at the time of the accident. Hence we think, under the authorities cited, the evidence was clearly competent.

The fifth assignment of error is that the court below erred in refusing the special request of the company as follows:

"If you find from the proof that at the time of the accident the plaintiff, Edgar Meacham Howard, by reason of his tender years, was incapable of exercising ordinary care and prudence for his own protection, and, while a passenger on the car of the defendant, was in the immediate control, care, and custody of his mother, and that the mother, as such

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custodian of the child, failed on her part to exercise ordinary care and prudence for the child's protection, and that this was the proximate cause of the accident, or contributed to it as its proximate cause, then the plaintiff cannot recover, although the defendant may have been itself guilty of negligence; provided, of course, you find that the defendant's negligence was not willful or intentional."

Counsel aver that, in requesting this charge, he did not invoke the doctrine declared in the case of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, which has been expressly repudiated by this court in two reported cases, *Whirley v. Whiteman*, 1 Head, 610 and *Bamberger v. Citizens' Street Railroad*, 95 Tenn. 18, 31 S. W. 163, 28 L. R. A. 486, 49 Am. St. Rep. 909. It was held in these cases that, in an action by a child through its next friend to recover damages for personal injuries, the negligence of its parent or guardian would not be imputed to the child, discarding the doctrine to that effect announced in *Hartfield v. Roper*, *supra*.

It is insisted, however, by counsel for the company, that the only point decided in *Hartfield v. Roper* was that the negligence of the parent in permitting the child to go unattended into a place of danger, or failing to confine it within safe limits, was to be imputed to the child, so as to defeat its action for damages predicated on the negligence of a third person. The distinction is sought to be made in this case that the negligence charged against the mother is not that she let her child go unattended upon the car. It is admitted that, under such circumstances, the company would have owed to the child a duty commensurate with its inability to care for itself; but it is insisted that, when the mother boarded the car with the child, it was under her immediate care and protection, and as such it was accepted as a passenger; that there was an implied obligation, which the mother assumed, to take care of the child. It is further insisted that the implied obligation of the street railway company was to carry the child, subject to proper care on the part of the mother, and that the negligence sought to be imputed to the child in this case is based on the negligence of the mother in failing to perform the duty which she, on behalf of the child, assumed.

The proposition formulated by counsel is that, in many of the states where the doctrine of *Hartfield v. Roper* has been expressly repudiated, it is nevertheless held that, while the parent's negligence in permitting the child to go into dangerous places unattended cannot be imputed to it, nevertheless where the parent is actually present and personally directing and controlling the actions of the child, and the alleged breach of duty to the child arises from a contractual relation assumed by the parent for and on behalf of the child, the child must bear the consequences of the parent's failure to discharge the assumed obligations and duties. Citing *O.*

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& M. Ry. v. Stratton, 78 Ill. 88; Toledo & W. Ry. v. Grable, 88 Ill. 441; G. H. & H. Ry. v. Moore, 59 Tex. 64, 46 Am. Rep. 265; East Saginaw St. Ry. v. Bohn, 27 Mich. 504; Pittsburgh, etc., Ry. v. Caldwell, 74 Pa. 421; Stillson v. Hannibal, 67 Mo. 671; Waite v. N. E. Ry. Co., El. Bl. & El. 719.

The leading English case on this subject is *Waite v. North-eastern Railway Co.*, El. Bl. & El. 719-728. It appeared in that case that a child, five years old, was in charge of its grandmother, who procured tickets for both at a railway station, with the intention of taking the train at that place. In crossing the track, for the purpose of reaching a platform on the opposite side, they were run down by a train, under circumstances of concurrent negligence on the part of the grandmother and the servants of the defendant. The grandmother was killed, and the child sustained personal injuries for which suit was brought. In the Court of Queen's Bench, Lord Campbell, Chief Justice, held that the infant was so identified with the grandmother that the action could not be maintained. This view was sustained in the Court of Exchequer Chamber. The judges generally based their opinions upon the ground that the action was for a breach of duty arising out of a contract made by the defendant with the person having the infant in charge. Lord Crowder, J., said:

"The case is the same as if the child had been in the mother's arms;" therefore whatever rights the plaintiff had must be predicated upon the contract of conveyance. "The contract of conveyance," said Cockburn, Chief Justice, "is in the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge."

In this case it was the negligence of the person in actual custody of the child at the time of the injury that was imputed to it. The rule of imputed negligence enunciated by the English courts is limited to cases where the parent or guardian is actually present and exercising control over the movements of the child. 2 Thompson on Negligence, p. 1182.

In *East Saginaw Ry. Co. v. Bohn*, 27 Mich. 516, the plaintiff, a child four years old, by being thrown from the platform of a street car, was run over, injuring his left leg in such a manner that amputation was necessary. Suit was brought on behalf of the infant to recover damages sustained by him. It appeared that at the time of the accident the plaintiff was in charge of his 12½ year old brother. The judge charged the jury that the railway company was required to act towards the plaintiff in the situation he then was; that is, considering his age and capacity, and the fact that he was there with a brother of the age named. They were not required to use towards him the same care and skill that might have been required had he been alone. They received him as he was,

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attended by his older brother, and were required to act toward him just as he was situated; and he further instructed them that if the brother was of an age to have exercised reasonable discretion, and plaintiff was seated where, with the exercise of such discretion in his behalf, he could ride in safety, plaintiff could not recover, unless the injury resulted wholly from the negligence of the company.

Judge Cooley said: "This charge appears to me all the defendant had a right to demand."

In *Stillson v. Hannibal*, 67 Mo. 671, the court said:

"The first question which naturally presents itself, in view of the facts, is whether the responsibility of the defendant in this case is varied from that which is ordinarily exacted from it towards persons of mature years, by reason of the tender years of the plaintiff. There are cases in which it is determined that the same degree of care is not to be expected or required from a person of immature age as would be required of one who had reached years of discretion; and, therefore, that what would be contributory negligence in the one case would not be so considered in the other. The distinction was recognized by this court in *Koons v. Iron Mountain Railroad Co.*, 65 Mo. 592. These are, however, cases in which the father, guardian, or other protector of the party injured is not present when the injury occurs. In the present case the father and child were together, and it was not simply a permission on his part that his little daughter should cross the railroad at the point she attempted, but the exact place was pointed out to her by her father, and she was proceeding within his view to follow his directions when the injury happened. If, under such circumstances, the father was guilty of negligence, that negligence must be imputable to the child in a suit by the child for damages. As was observed by the Supreme Court of Massachusetts in a similar action (*Holly v. Boston G. L. Co.*, 8 Gray, 132 [69 Am. Dec. 233]): 'She was under the care of her father, who had the custody of her person and was responsible for her safety. It was his duty to watch over her, guard her from danger, and provide for her welfare; and it was hers to submit to his government and control. She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that parental authority which it was both his right and duty to exert. Any want of ordinary care on his part is attributable to her in the same degree as if she was wholly acting for herself.' In *Waite v. N. E. Railway Co.*, 96 Eng. C. L. 728, s. c., El. Bl. & E. 719, the question was whether, in an action by an infant for injuries caused to him by the negligence of the defendant, it could be set up by way of defense that the negligence of the person in charge of the infant contributed to the accident. The Court of Queen's Bench held that it could, and in this opinion the Court of

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Exchequer Chamber concurred. Williams, J., said: 'There was here, as it seems to me, from the particular circumstances of the case, an identification of the plaintiff with the grandmother, whose negligence is therefore an answer to the action. The person who has charge of the child is identified with the child. If a father drives a carriage, in which his infant child is, in such a way that he incurs an accident, which by the exercise of reasonable care he might have avoided, it would be strange to say that, though himself could not maintain an action, the child could.' In *Ohio & Mississippi Railroad v. Stratton*, 78 Ill. 88, s. c., 3 Cent. L. J. 415, the Supreme Court of Illinois held that the negligence of the parent or guardian having in charge a child of tender years, where it is the proximate cause of the injury by unnecessarily and imprudently exposing it to danger, prevents any recovery from the carrier corporation. In the present case the inquiry should have been whether the father was guilty of any contributory negligence, and whether such negligence, if any there was, was the proximate cause of the injury."

Grethen v. Chicago R. R. (C. C.) 22 Fed. 609; 19 Am. & Eng. R. R. Cases, 342; *The Burgundia* (D. C.) 29 Fed. 464; *Chicago R. R. v. Logue*, 158 Ill. 621, 42 N. E. 53; *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682; *Id.*, 103 Mass. 507; *Morrison v. Erie R. R. Co.*, 56 N. Y. 302; *Lannen v. Albany Gas Light Co.*, 46 Barb. 264; *Id.*, 44 N. Y. 459; *Bellefontaine R. R. Co. v. Snyder*, 18 Ohio St. 400, 98 Am. Dec. 175; *Kay v. Penn. R. R. Co.*, 65 Pa. 276, 3 Am. Rep. 628; *North Penn. R. R. v. Mahoney*, 57 Pa. 187; *Pittsburg R. R. v. Caldwell*, 74 Pa. 421.

The circuit judge on the trial of this cause did instruct the jury that the contributory negligence of the mother, who was in actual custody of the child at the time of the injury, was imputable to the child. The court said:

"It further appearing that the child was brought upon the car by its mother, and was in her care and custody, the same degree of care and protection of the child was thus imposed on its mother as would have been imposed upon an ordinary passenger of intelligence and experience, * * * that degree of care and precaution that an ordinarily prudent person would have exercised under like circumstances and conditions; and in arriving at that you can look to the age of the child, the kind of car they were riding on, the fact that the cars in their ordinary travel necessarily cross switches and frogs and use curves upon the track; and if the proof shows that in crossing these frogs, switches, and curves there is jerk, jolt, or jostle occasioned thereby, that fact should be considered; and if the mother failed to exercise that degree of care and precaution for the safety and protection of the child incumbent on her as explained to you above, and such failure on the part of the mother was the proximate and con-

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trolling cause of its injuries, then the child could not recover in this action."

And further on in the charge, his honor charged as follows:

"Again, should you find that the mother of the plaintiff failed to exercise the ordinary care and caution for the protection of a child that has been explained to you above as incumbent upon her, and such failure upon her part was the proximate and controlling cause of his fall and injuries, then, and in that event, you should find for the defendant. So, also, should you find that the negligence of the plaintiff's mother and the negligence of the defendant company equally contributed towards the accident and injury, in such event you should find for the defendant.

"Should, however, you find that the negligence of the mother contributed materially to the accident and injury to the child, but was not its proximate and controlling cause, that would not deprive the plaintiff of a right to recover, but should be taken by you in mitigation of the damages you would otherwise allow."

It will thus be seen that the doctrine of imputed negligence was distinctly charged by the circuit judge. But the precise proposition presented by the assignment of error is that the court failed and refused to charge that, if the negligence of the mother contributed proximately to bring about the accident, plaintiff could not recover. It will be observed that in the general charge already quoted the jury were told there could be no recovery if the negligence of the mother was the proximate and controlling cause of the injury, or if the mother and defendant equally contributed in producing the accident; but the court refused to charge that if the negligence of the mother proximately contributed in any degree to produce the injury the defendant company would not be liable. Ordinarily, such failure and refusal to charge would constitute prejudicial error for which there should be a reversal. *Nashville Railway v. Norman*, 108 Tenn. 334, 67 S. W. 479. But unless there are facts in the record showing heedlessness on the part of the child, and negligence on the part of the mother in failing to prevent the incautious act of the child, there would be no basis for imputing to the child any negligence on the part of the mother that proximately contributed to the injury.

It seems that even in jurisdictions where the doctrine of *Hartfield v. Roper* has been recognized, it is now held the rule is not applicable when it appears that the injured child, although non sui juris, has exercised ordinary care to avoid the injury, or, as it is otherwise expressed, when the child used due care there is no imputability. See cases cited in 7 Am. & Eng. Law, 451.

Says Mr. Thompson, a sensible interpretation of the rule is that if a child, though non sui juris, has not committed or omitted any act which would constitute negligence in a per-

son of full discretion, an injury by the negligence of another cannot be defended on the ground of contributory negligence of the parent or custodian in not restraining the child. In such a case the child, being in a lawful place, and exercising what would be regarded as ordinary care in an adult, is entitled to recovery for an injury occasioned by the wrongful act of another, irrespective of the conduct of the parents. *McGarry v. Loomis*, 63 N. Y. 104, 20 Am. Rep. 510.

A sententious statement of this rule is made by Hogeboom, J., in *Lennan v. Albany Gas Lt. Co.*, 44 N. Y. 459, viz.: "I know of no just or legal principle which, when the infant himself is free from negligence, imputes to him the negligence of the parent, when if he were an adult he would escape it. This would be, I think, visiting the sins of the fathers upon the children to an extent not contemplated in the Decalogue, or in the more imperfect digest of human law."

The uncontradicted proof in this record is that at the time of the accident the child was seated in a place provided for passengers, with his right hand holding to the guard attached to the seat. He was not leaning out, or standing on the seat or floor, or committing any other negligent or incautious act, even if negligence might be ascribed to one so immature in years. While the child was thus in the exercise of as much care as an adult could be under similar circumstances, there was a plunging of the car into the depression caused by the defective track, and he was jostled off, just as an adult might have been under like conditions. If the child was in no fault, how is the negligence of the mother to be imputed to it? There was no negligent act of the child that should have been prevented by the mother. The record shows that the mother was seated facing the child on the seat immediately opposite, where she could see all the movements of the child, and readily restrain any imprudent act on its part. So that, upon the uncontradicted proof, we fail to perceive any negligence either on the part of the mother or child. Hence the failure and refusal of the Circuit Judge to charge that any proximate contribution of negligence on the part of the mother would defeat the child's right of recovery was innocuous, and not reversible error.

It is assigned as error that the court refused to charge, viz.:

"When it is said that a carrier of passengers must provide for their safety, as far as human skill and foresight will go, it is not meant that he shall exercise all that care and diligence of which the human mind can conceive, or all the skill and ingenuity of which he is capable. The law only requires of it all those things necessary for the safety of the passenger that are reasonable and consistent with the business of the carrier, and proper to the means of conveyance employed by him to be provided, and that the highest de-

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gree of practical care and diligence and skill shall be adopted that is consistent with the mode of conveyance used, and that will not render its use impractical and inefficient for its intended purposes."

It suffices to say, in answer to this assignment of error, that the court did not charge that a carrier of passengers must provide for their safety as far as human skill and foresight will go, and hence there was no occasion to explain what was meant by those terms. The circuit judge might properly have charged that rule as applied to the liability of a carrier to his passengers, but as a matter of fact he only charged that "it was incumbent upon the defendant to keep its track, cars and appliances, * * * its switches and frogs, * * * in reasonably safe order and condition." Surely there can be no reasonable ground on the part of the company to complain of this charge.

It results there is no error in the record, and the judgment will be affirmed.

LUCAS et al. v. NEW YORK, N. H. & H. R. CO.

(Circuit Court of Appeals, Second Circuit, April 21, 1904.)

[130 Fed. Rep. 436.]

Covenants—Construction—Performance.*

Defendant contracted with plaintiffs' predecessor in title that, in consideration of its dedicating a strip of land to a village for the making of a railroad designated as "Depot Place," defendant, when it changed its passenger station, would make suitable entrance ways to its station grounds, with suitable roadways and sidewalks, and continue such Depot Place eastward. This the railroad did, but shortly after the dedication the village became a municipal corporation, and thereafter so changed the grade of an avenue at the point where the continuation of Depot Place into its grounds joined the same that the avenue was raised about five feet above the surface of the driveway. The city then built a retaining wall on the easterly side of the avenue, obstructing the entrance to Depot Place, and depriving plaintiffs of the driveway, whereupon defendant opened a different entrance to its grounds: *held*, that defendant's covenant did not bind it to maintain a permanent entrance and roadway, and defendant, having maintained the same until the grade of the adjoining street was changed, was not liable for breach thereof.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a direction of a verdict in favor of the defendant by the United States Circuit Court for the Southern District of New York.

O. D. Tompkins, for plaintiffs in error.

Edwin E. Sprague, for defendant in error.

*For authorities in this series on the subject of the forfeiture of the railroad right of way for failure to comply with terms of grant, see foot-note appended to *Peterson v. Atlantic & B. R. Co.* (Ga.), 12 R. R. R. 579, 35 Am. & Eng. R. Cas., N. S., 579.

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Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The plaintiffs herein, as successors in title of one Charles Nettleton, brought this action to recover damages for an alleged breach of contract, based upon the following facts:

In April, 1891, said Nettleton, plaintiffs' predecessor in title, being the owner of a strip of land adjacent to the land of defendant, entered into a contract with defendant, whereby it was provided that Nettleton should dedicate to the village of Mt. Vernon, for highway purposes, a strip of his land varying in width from 26 feet to 33 feet, and that defendant should dedicate to said village for like purposes a strip of its adjacent land sufficient to make altogether a roadway 40 feet wide, to be designated as "Depot Place." Said contract also provided as follows:

"Said railroad company, if and when it changes the present site of its passenger station at Mount Vernon, will make suitable entrance ways to its station grounds, with suitable roadway and sidewalks in continuation eastwardly of its said Depot Place."

At the trial the following stipulation was entered into between the parties:

"That said dedications were made by a suitable instrument duly acknowledged and recorded in the office of the register of Westchester county on the 18th day of November, 1897, after said railroad company had changed the grade and line of its tracks and the site of its passenger station as they existed on the 15th day of April, 1891, and that said dedications were duly accepted by the city of Mt. Vernon by a resolution of the common council of said city passed on or about the 21st day of December, 1897. That, in accordance with article 6 of said contract, said railroad company, when it changed the site of the passenger station at Mt. Vernon as it existed on April 15, 1891, made suitable entrance ways to said station grounds, with suitable roadways and sidewalks, in continuation eastwardly of said Depot Place."

Shortly after said dedication the village of Mt. Vernon became a municipal corporation, and in 1898 it changed the grade of Third avenue at the point where the driveway in continuation of Depot Place into defendant's grounds joined Third avenue so that the surface of said avenue was raised about five feet above the surface of the driveway. The City of Mt. Vernon built a retaining wall on the easterly side of said avenue, and thus obstructed the entrance to Depot Place, and deprive plaintiffs of their driveway. The defendant refused to grade the continuation or driveway across its land to Depot Place, but built a fence on top of said retaining wall, and opened another entrance to its grounds a short distance north of the point where the former entrance joined Third avenue.

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The court, in directing a verdict for defendant, held that, in view of the decisions in the federal courts, the defendant company was not required to restore suitable roadways and entrance ways once made in conformity with the terms of a contract when they had been disrupted by local authority.

The arguments in support of plaintiffs' assignments of error, considered together, are to the effect that in the construction of said contract the court should consider what must have been the mutual intention of the parties, namely, that the roadway and entrance should be permanent, and must therefore construe the contract as one, not only to make, but to forever maintain, said entrance and driveway. Inasmuch, however, as there is no ambiguity in the terms of the contract, there is no occasion for the application of the doctrine of construction, and the apparent meaning of the instrument must be regarded as the one which was intended. *Schoonmaker v. Hoyt*, 148 N. Y. 425, 42 N. E. 1059; *Christopher St. R. Co. v. 23d St. R. Co.*, 149 N. Y. 51, 43 N. E. 538. The case chiefly relied upon by counsel for plaintiffs is *Beach v. Crain*, 2 N. Y. 87, 49 Am. Dec. 369. But there the covenant sued upon provided that Crain should erect the gate and the Beaches should keep it in repair. The contract further provided that Crain might keep the gate there during his pleasure, and that all the repairs necessary to be made to said gate were to be made by said Beaches. The court held that in these circumstances the covenant was substantially one to keep the gate in repair while it was the pleasure of Crain that it should remain, and that, as covenants to repair have been uniformly considered as importing the duty to rebuild, the Beaches were bound to rebuild in accordance with said rule. But the rule thus stated is limited to actions upon covenants to repair, and has no application to entire contracts. *Schell v. Plumb*, 55 N. Y. 594.

It is unnecessary to discuss the federal cases cited by counsel for plaintiffs as to the general rule to be applied in the construction and interpretation of a contract, because his contentions, so far as concerns the case at bar, have been disposed of by the Supreme Court of the United States, and two federal Circuit Courts of Appeals have determined the rule to be applied to such contracts in cases involving the precise question here presented. In *Texas, etc., Railway Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, the city of Marshall agreed to give to the Texas & Pacific Railway \$300,000 in county bonds and 66 acres of land within the city limits for shops and depots; and the company, "in consideration of the donation," agreed "to permanently establish its eastern terminus and Texas offices at the city of Marshall," and "to establish and construct at said city the main machine shops and car works of said railway company." The court held that the contract of the railroad com-

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pany to permanently establish its eastern terminus and Texas offices at the city of Marshall was satisfied and performed when it established and kept a depot and set in operation the shops and kept them going for a period of eight years and until the interest of the railroad company and of the public demanded the removal of some or all of these subjects of the contract to some other place; and that the words "permanent" or "permanent establishment" do not mean "forever" or "lasting forever." The court further held that such a covenant did not amount to a covenant that the company would never cease to make its eastern terminus at Marshall, and that, whatever might be the changes of time and circumstances of railroad rivalry and assistance, these things alone should remain forever unchangeable; and that such a contract, if not void on the ground of public policy, would be so objectionable as to obstruct improvement and changes, and that such construction should be avoided if possible. To the same effect are the following cases: Mead v. Ballard, 7 Wall. 290, 19 L. Ed. 190; Jones v. Newport News & Mississippi Valley Co., 65 Fed. 736, 13 C. C. A. 95; Texas & Pacific Railway Co. v. Scott, 77 Fed. 728, 23 C. C. A. 424, 37 L. R. A. 94.

In view of the foregoing decisions it is unnecessary to further discuss the contention of plaintiffs. These cases go much further than we are required to go in the disposition of the present case. Here it is to be observed that not only was there no covenant for repairs, or for a permanent location, but that the plaintiffs' predecessor in title unreservedly dedicated to said village his strip of land in order that it, with the adjoining strip dedicated by defendant, should constitute a new highway, to be known as "Depot Place." The agreement as to the entrance to the grounds was independent of said dedication, and dependent upon an event entirely within the control of defendant.

The judgment is affirmed.

THOMAS v. SOUTH HAVEN & E. R. CO.

(Supreme Court of Michigan, Oct. 18, 1904.)

[100 N. W. Rep. 1009.]

Contract—Construction of Side Track—Consideration.

Where a railroad company verbally agreed to construct a side track by plaintiff's building if he would move it to land owned by plaintiff near defendant's track, and repair and remodel it so as to make it suitable for a warehouse, and plaintiff did so, the expense incurred by the plaintiff was a sufficient consideration to sustain the contract, though plaintiff, at the time defendant's promise was made, did not agree to remove and remodel the building.

Same—Same—Statute of Frauds.

A verbal agreement to lay a side track by plaintiff's building if plaintiff would repair and remodel the building and move it to a cer-

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tain point is not within Comp. Laws 1897, § 9515, subd. 1, as a verbal agreement not to be performed within one year.

Error to Circuit Court, Van Buren County; John R. Carr, Judge.

Action by Wesley J. Thomas against the South Haven & Eastern Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Samuel H. Kelley, for appellant.

Thos. J. Cavanaugh, for appellee.

CARPENTER, J. Plaintiff recovered a verdict and judgment in the court below for the nonperformance by defendant of its alleged contract to construct a side track alongside of plaintiff's warehouse. Plaintiff's testimony tended to prove that defendant, acting through its general manager, verbally agreed to construct the side track in question if plaintiff would move to a piece of land near its track, owned by him, a large building situated remote therefrom, and repair and remodel the same so as to make it suitable for a warehouse; that he at once removed, repaired, and remodeled the building; and that defendant refused to construct the side track as agreed. Defendant denied the making of this agreement. The issue was submitted to a jury, who, as above stated, rendered a verdict in plaintiff's favor.

We are asked to reverse this judgment on the ground that, according to plaintiff's testimony, there was no consideration for the alleged contract. This point is not well taken. The expense incurred by the plaintiff in removing, repairing, and remodeling the building was the consideration, and it was a sufficient consideration. See *Sanford v. Huxford*, 32 Mich. 313, 20 Am. Rep. 647; *Stevens v. Corbitt*, 33 Mich. 458; *People v. Taylor*, 2 Mich. 251. In announcing this conclusion, we overrule defendant's contention that this consideration was insufficient because plaintiff did not, at the time of defendant's promise, agree to remove, repair, and remodel the building. "It is not necessary that the consideration should exist at the time of making the promise, for, if the person to whom the promise is made should incur any loss, expense, or liability in consequence of the promise, and relying upon it, the promise thereupon becomes obligatory. Thus if A. should promise B. to pay him a sum of money if he will do a particular act, and B. does the act, the promise thereupon becomes binding, although B. at the time of the promise does not engage to do the act." *People v. Taylor*, supra. See, also, *Stevens v. Corbitt*, supra.

The contract in suit might have been performed within one year after it was made, and therefore it is not, as defendant contends, within the terms of section 9515, subd. 1, Comp. Laws 1897, which makes void every verbal agreement "that by its terms is not to be performed within one

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year from the making thereof." See *Railroad Co. v. Forbes*, 30 Mich. 165.

Nor was the verdict, in our judgment, contrary to the weight of evidence or excessive.

The judgment is affirmed, with costs. The other Justices concurred.

DOHERTY v. ARKANSAS & O. R. CO.

(Court of Appeals of Indian Territory, Oct. 19, 1904.)

[82 S. W. Rep. 899.]

Subscription to Railroad Extension—Ultra Vires—Estoppel.

One who subscribes to the building of a railroad in consideration of the extension of its line to a point without the state in which the railroad company is, by its charter, empowered to construct its line, is estopped to deny his obligation, after the railroad has been built, on the ground that the contract is ultra vires, especially as it is one within the general scope of the powers conferred upon the railroad by the Legislature.

Questions for Jury.

The questions of the existence of an agreement and performance of the same are for the jury.

Directing Verdict.

It is error to direct a verdict unless there is no evidence to sustain a cause of action or defense.

Appeal—Review.

A specification of error in the giving of instructions, which merely refers to the pages of the transcript in which the instructions which comprise the entire charge are to be found, and asks the court to consider the same, "without compelling appellant to set it out in full," is not in compliance with the rules of court, and deserves no consideration.

Subscription to Railroad Extension—Validity—Immaterial Question.

Where the conditions of a subscription to the extension of a railroad were merely that the extension should be of standard gauge, constructed of new material, and should become due when the railroad was completed to a certain town and the first train run thereon, if done on or before a certain date, it was immaterial whether the railroad had any interest in the town or not, and evidence as to such interest was properly excluded.

Same—Same—Same.

In an action on a subscription to the extension of a railroad, conditioned to become due when the railroad was completed to a certain town and the first train run thereon, evidence as to whether the railroad put in ties after it had completed its road, and whether it had a schedule for its trains, and as to the speed of the trains run, was immaterial.

Same—Same—Evidence—Acceptance by Railroad.

In an action on a subscription to the extension of a railroad, evidence as to the acceptance of the proposition and the commencement of work after the deposit of the subscription was properly admitted.

Same—Same—Evidence Stricken Out.

In an action on a subscription to the extension of a railroad, evidence that the first-class steel originally laid upon the track was subsequently changed, but not showing by whom it was changed, was properly stricken out.

Same—Same—Evidence Properly Excluded.

In an action on a subscription to the extension of a railroad, con-

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ditioned to be completed by a certain date, evidence as to whether the railroad worked on the track after that date was properly excluded.

Same—Right to Withdraw.

Where defendant subscribed to a railroad for the purpose of inducing it to build its line into a certain town, and the representatives of the railroad accepted the subscription, and acted upon the same, and began work, defendant could not withdraw the subscription or release himself therefrom.

Same—Validity—Notice of Acceptance.

Where a subscription to the extension of a railroad was accepted and acted upon by the railroad, and the extension completed, the subscriber could not then contend that he was not bound by his subscription because the railroad did not notify him that it had accepted the same.

Contracts—Consideration.

Any benefit accruing to one making a promise, or any loss, trouble, or disadvantage undergone by or charge imposed upon him to whom it is made, is a sufficient consideration to sustain the same.

Instructions.

Instructions upon propositions not mentioned in the pleadings, are foreign to the issues, are properly refused.

Subscription to Railroad Extension—Validity—Instruction.

In an action on a subscription to the extension of a railroad, a charge that it was necessary to find a certain state of facts not mentioned in the contract in order to find that the road had been completed, was properly refused, and the jury instructed instead that they must find that the road, on the date by which it was to be completed, "complied with the conditions of the defendant's subscription."

Same—Same.

Substantial compliance with the terms of a contract of subscription to the extension of a railroad is sufficient to entitle the railroad to collect such subscription.

Same—Right to Withdraw—Instructions.

In an action on a subscription to the extension of a railroad, a charge that if, after the subscription was signed by defendant, plaintiff demanded an additional subscription as a condition of building its road, defendant had a right to treat the negotiations at an end, and to withdraw his subscription, in which case plaintiff could not recover, was proper, and a proviso that such demand by plaintiff and withdrawal of promise by defendant must have been made before plaintiff had acted thereon by commencing the construction of its road was unnecessary and erroneous.

Harmless Error.

An error in an instruction is not sufficient to cause a reversal where it does not affect materially the substantial rights of appellant.

Instructions.

Instructions sufficiently covered by other instructions given are properly refused.

Appeal from the United States Court for the Northern District of the Indian Territory; before Justice Joseph A. Gill, March 14, 1903.

Action by the Arkansas & Oklahoma Railroad Company against W. H. Doherty. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 18th day of November, 1901, plaintiff below (appellee here) filed its complaint, and alleged that it is a cor-

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poration, and that the defendant below (appellant here) is indebted to plaintiff in the sum of \$650, with interest from December 31, 1900, upon a subscription made by defendant, which is lost, in consideration that plaintiff should extend its line into the Cherokee Nation, and build a railroad to the town of Grove, Ind. T., the same to be due and payable as follows, viz.: One-half six months after date, or as soon thereafter as all of said extension is graded into and through the town of Grove, Ind. T.; second one-half ten months after date, or as soon thereafter as said road is completed to said town of Grove, Ind. T., and first train is run thereon. Should this not be paid when due, to bear 8 per cent. interest thereafter. This obligation to be null and void should said road not be completed to said town of Grove on or before December 31, 1900. Plaintiff alleges it complied with the terms of its contract, and that defendant has refused to pay his said subscription, and therefore it asks judgment.

On February 12, 1903, defendant filed his amended answer, and says he has not sufficient information to either admit or deny that plaintiff is a corporation, and avers the fact to be that, if the plaintiff was a corporation, it did not have, under its charter, a right to build a road into the Indian Territory or to Grove, Ind. T., or through the same. Defendant denies that any such contract was ever entered into between plaintiff and defendant as alleged, admits he signed a subscription, but says same was never acted upon by plaintiff, and says the one alleged by plaintiff is not a copy or the substance of the same. Defendant excepts to any evidence of contract alleged, because it was not stamped or authorized to be stamped as required by law. Defendant denies plaintiff ever completed its contract as alleged.

On February 14, 1903, plaintiff filed its reply to amended answer, and denies each and every material allegation in defendant's answer; further denies the special allegation in defendant's answer that plaintiff had no authority to build a road in the Indian Territory to Grove, Ind. T., and alleges that the said plaintiff did have such authority from the Secretary of the Interior of the United States, as provided by law.

On February 14, 1903, said cause came on for trial before a jury, and on February 17, 1903, the jury returned a verdict as follows: "We, the jury duly impaneled and sworn in the above-entitled cause, find the issues in favor of the plaintiff and against the defendant, and find that the defendant is indebted to the plaintiff in the sum of \$650, with interest at rate of 6 per cent. from Dec. 31, 1900, to date. D. F. Clark, Foreman."

On February 19, 1903, defendant filed his motion for new trial. On March 14, 1903, the court overruled the motion for new trial, to which defendant excepts, and the court rendered the following judgment: "And thereupon it is by the

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court considered and adjudged that, in accordance with the verdict heretofore rendered the plaintiff herein, the Arkansas & Oklahoma Railroad Company, do have and recover of and from the defendant herein, W. H. Doherty, the sum of seven hundred and thirty-four dollars and fifty cents, and all costs herein laid out and expended, the same to be taxed by the clerk, and the judgment to draw six per cent. interest from this date."

Defendant is granted stay of execution, and gave superseas bond, and appealed to this court.

W. H. Kornegay, for appellant.

James S. Davenport, for appellee.

TOWNSEND, J. (after stating the facts). The appellant has filed assignments of error, containing 18 specifications, in which objection was made and exceptions saved, the first of which is that "the court erred in refusing to direct the jury to return a verdict for defendant." Appellant insists under this specification, first, that the building of its road into the Indian Territory by plaintiff was *ultra vires*, and that neither the building of it nor an obligation so to do would support a promise to pay to plaintiff for so doing; the appellant insisting that, because the charter of the company, as applied for and granted in the state of Arkansas, limits its line as described between points in the territory of Arkansas, therefore, if it builds or contracts to build its line beyond the limits of said state, all its contracts for such extension are *ultra vires*, notwithstanding the fact that the Secretary of the Interior has granted his permit to the company to build its line in the Indian Territory. Is this a correct definition of *ultra vires* under the law? If the contract had been made concerning an extension in the state of Arkansas, it would not be insisted that such a contract would be *ultra vires*; therefore the power to make such a contract was granted to that company. Does *ultra vires* apply to the place where the contract is made, or to the power in the company, through its officers, to make it? The contract sued upon is not prohibited by the charter of the company. In *De La Vergne Refrigerating Company v. German Savings Institution*, 175 U. S. 40, 60, 20 Sup. Ct. 20, 44 L. Ed. 66, the contract relied upon was prohibited by its charter, and the court quotes with approval the language used in *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 61, 11 Sup. Ct. 488, 35 L. Ed. 68, as follows: "A contract of a corporation which is *ultra vires* in the proper sense—that is to say, outside of the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract

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cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the contract validity, or be the foundation of any right of action on it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as any person contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or its action, because such prerequisites might have in fact been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws." In *Green Bay & Minnesota R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 2 Sup. Ct. 221, 27 L. Ed. 413, the court says: "But whatever, under the charter and general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited." *Attorney General v. Great Eastern Ry. Co.*, 5 App. Cas. 473; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221. One who contracts with a corporation cannot deny its corporate authority in order to defeat the enforcement of its contract. *Mattie D. Falls et al. v. United States Loan & Building Co.*, 97 Ala. 417, 13 South. 25, 24 L. R. A. 174, 38 Am. St. Rep. 194. Is not the appellant, after making the contract with the appellee, and having the road built into the town of Grove, Ind. T., and thereby securing the benefits of the contract, estopped from denying his obligation, especially as the contract made by appellee was within the general scope of the powers conferred upon it by the Legislature? In *Ohio & M. R. R. Co. v. McPherson*, 35 Mo. 26, 86 Am. Dec. 128, which was a suit to recover a subscription to the company, the court said: "But, aside from the question whether the action of the board of directors beyond the bounds of the state was a sufficient expression of assent to give vitality to the corporation, the appellant's position towards the respondent is such as ought to preclude him from denying its corporate existence. The case of the Dutchess Cotton Manufacturing Company v. Davis, 14 Johns. 238 [7 Am. Dec. 459], was a suit on a promise to pay the price of stock subscribed by the defendant. The court, on the authority of *Henriques v. The Dutch West India Company*, 2 Ld. Raymond, 1535, held that the defendant, having entered into a contract with the plaintiffs in their corporate name, thereby admitted them to be duly constituted a body politic and corporate. * * * And their authority to act in behalf of the corporation could not be questioned by the appellant in this, a collateral, suit, without showing a judgment of ouster against them in a direct proceeding by the government for that purpose." In *Redfield on Railways*, vol. 1, p. 202, it is said: "And even

where a mere stranger subscribes to a railway company, with others, in order to induce the company to build a station house and improve the roads to it, and to aid the company in such work, and the company perform the condition on their part, the subscription is upon sufficient consideration, and may be enforced against the subscribers." In *Kennedy v. Cotton*, 28 Barb. 59, which was a suit on a subscription for \$50 in consideration that a railroad company would build a depot for the accommodation of travelers, the court said: "The agreement in question clearly imports a request to the company to construct the buildings, and establish and improve the roads specified in the agreement, and a compliance with the request by the company, so far as to construct the depot, which was the consideration, on its part, of the agreement, was a sufficient consideration for the defendant's undertaking. The recent case of *Barnes v. Perine*, 2 Kern. 18, and the cases there referred to, are entirely decisive upon this point, and render any discussion of it unnecessary."

Under this specification appellant further insists that there was no agreement between appellant and appellee, and, if there was an agreement, that the evidence does not show a performance of the same by appellee. These are questions that were very properly submitted to the jury. The court could not take the case from the jury where there was evidence to support the contention of the appellee. It is error in the trial court to direct the jury to find and give verdict, except in cases where there is no evidence to sustain the cause of action or defense. *Little Rock & Fort Smith R. R. Co. v. Henson*, 39 Ark. 419; *Catlett v. R. R. Co.*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254; *Little Rock & Fort Smith R. R. Co. v. Barker and Wife*, 33 Ark. 350, 34 Am. Rep. 44; *Overton v. Matthews*, 35 Ark. 147, 37 Am. Rep. 9.

The second specification of error is as follows: "The court committed error in giving contradictory instructions and instructions calculated to confuse the jury. The instructions complained of in this assignment being the entire charge as found on pages 115 to 120 of the transcript, and which the court is asked to consider without compelling the appellant to set it out in full." This is not compliance with the rules of the court, and deserves no consideration whatever. But from a careful reading of the charge given by the court no one able to comprehend the English language clearly and forcibly stated, could regard said instructions as contradictory, or calculated to confuse the jury.

The third specification of error is the refusal of the court to allow witness Bayless to be asked on cross-examination the following: "Was the question of the interest that the Arkansas & Oklahoma Railroad Company should have in the town that would be laid out there discussed at that first meeting?" As the only conditions of the contract were that "said extension be of standard gauge, laid with new steel

rails of not less than 60 lbs. per yard, all material to be new," and the subscription should become due when the railroad was completed to the town of Grove, Ind. T., and the first train is run thereon, and the subscription to become void if these conditions were not complied with on or before December 31, 1900, it was wholly immaterial whether the railroad company had any interest in said town or not. Therefore the court ruled correctly.

The fourth specification was the refusal of the court to allow witness Bayless to be asked whether the company did not put in ties after it had completed its road, and whether it had a schedule for its trains; both questions incompetent and immaterial, and were properly excluded by the court.

The fifth specification was permitting the appellee to ask witness Mayes if, when the subscription was deposited in the Bank of Southwest City, the company did not accept the proposition, and go to work along that line. This went to the question of liability of appellant on his subscription, and was material, and the court ruled correctly.

The sixth specification was a question as to the speed of the trains-run, and was wholly immaterial.

The seventh specification was the refusal of the court to allow appellant to ask several questions, which were irrelevant and immaterial, and were properly excluded. Appellant also excepts to the striking out the following: "Well, they have changed it. The kind they have got there now is old and narrow." This refers to the steel placed on that railroad, and should be considered in connection with what preceded the words stricken out. Both together are as follows: "Q. Do you know the kind of steel that was put on this track, Mr. Remson? A. Yes, sir; it was first-class. Q. What kind is there now? A. Well, they have changed it. The kind they have got there now is old and narrow." It thus appears that the steel originally placed on that track was "first-class," but that subsequently it was changed—by whom does not appear. This objection and exception simply represents the frivolous character of many of the alleged errors.

The eighth specification was the refusal of the court to allow the appellant, while on the stand as a witness, to be asked whether the company worked on the track after December 31, 1900. It was properly excluded as immaterial, and appellant also includes an exception which had already been made in his fourth specification.

The ninth specification was the giving of the following instruction: "The court instructs the jury that if the defendant, among others, subscribed to the said railroad company for the purpose of inducing it to build its road into the town of Grove, Ind. T., and the representatives of the railroad company accepted the subscription, and acted on the same, and began work, then the court instructs you that the defendant is bound, and could not, at a subsequent date to

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the time the plaintiff acted upon said subscription, withdraw his subscription, or release himself from the obligation he had undertaken." This instruction is a clear statement of the law applicable to the facts, as appellee contended had been shown in the evidence. 1 Beach, Con., 65. Philomath College v. Hartless, 25 Am. Rep. 511; Bates County v. Winters, 112 U. S. 327, 5 Sup. Ct. 157, 28 L. Ed. 744; Marie v. Garrison, 83 N. Y. 26; Ft. Worth & R. G. Ry. Co. v. Lindsey (Tex. Civ. App.) 32 S. W. 716; Armstrong v. Karshner (Ohio) 24 N. E. 897; Amherst Academy v. Cows, 6 Pick. 427, 17 Am. Dec. 387.

The tenth specification was the refusal of the court to give the instruction No. 1 requested by appellant, and modifying and giving the same, as follows: "The plaintiff, before it can recover in this case, must prove, first, that the writing sued on by the plaintiff was signed by defendant or his duly authorized agent; second, that the plaintiff accepted the same, or that defendant, after signing the same, allowed the plaintiff to build and complete the road without notifying the plaintiff that he would not abide by the terms of said writing; third, the road was completed within the time specified and in the manner specified, and the grading of the road should be completed in the manner specified." The only difference between the instruction given and the one refused was the omission from the one given of the following words from the second clause: "and notified defendant of such acceptance, and obligated itself to build the road." The contention of appellant is that, before he could be bond upon his subscription, the appellee must have notified him that it had accepted his subscription and obligated itself to build the road. The appellant has failed to sustain his contention by the citation of many authorities, and the contract of subscription makes no such requirement on the part of appellee. The consideration for the promise was the building of the railroad, and it was to be void if not completed by December 31, 1900. The question of acceptance of the subscription was submitted to the jury as a question of fact, and when accepted and acted upon by appellee, and the road constructed without any notice to appellee that appellant was in any way dissatisfied, is there any justice or equity in permitting appellant to say: "I will not pay. True, the road has been constructed according to the terms of my contract of subscription, and the town of Grove has the road. Whatever benefits we expected to secure by the building of the road, we have obtained. But I will not pay because you did not notify me that you had accepted my subscription, though, by its terms, you were not required to do so." We are clearly of the opinion that the instruction of the court correctly stated the law. Any benefit accruing to him who makes the promise, or any loss, trouble, or disadvantage undergone by or charge imposed upon him to whom it is made

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is a sufficient consideration to sustain a promise. *Amherst Academy v. Cowls*, 6 Pick. 427, 17 Am. Dec. 387; *Barnes v. Perine*, 12 N. Y. 18.

The eleventh specification was the refusal of the court to give an instruction already covered by the general instructions of the court.

The twelfth specification is a request for an instruction upon a proposition not mentioned in the pleadings, and foreign to the issues in the cause, and was properly refused.

The thirteenth specification was the refusal of the court to give the instruction No. 4 requested by appellant, and giving the same in a modified form, as follows: "In order for the defendant to recover in this case, it must have completed its road to Grove on or before December 31, 1900. The fact that rails and a train run over them is not conclusive that the road is entitled to recover, but the company, in order to recover, must show that the road on December 31, 1900, complied with the conditions of the defendant's subscription." The instruction requested was that the court should tell the jury that it was necessary, in order to find that the road had been completed, to find a state of facts not mentioned in the contract. The court very properly refused the request, and instructed the jury that they must find that the road on December 31, 1900, "Complied with the conditions of the defendant's subscription." Substantial compliance with the terms of the contract was sufficient to entitle appellee to collect the subscription.

The fourteenth specification was the refusal of the court to give instruction No. 5 requested by appellant, and giving the same in a modified form, as follows: "If you believe from the evidence that after the writing sued on was signed by the defendant the plaintiff demanded that a new and additional writing be signed by the defendant, and that with the demand to sign an additional writing the plaintiff stated that, if the demand of the plaintiff was not complied with, the plaintiff would not build the road, the defendant had a right to treat the negotiations at an end, and to withdraw the offer contained in the writing sued on, and, if defendant did on such demand, coupled with such statement, treat the negotiations as ended, and withdraw his promise in such a way as to notify plaintiff, and never afterwards renewed negotiations, the plaintiff cannot recover; provided such demand by plaintiff and such withdrawal of promise by defendant were made before plaintiff had acted thereon by arranging for and commencing the construction of its road." Had the appellant inserted in his instruction after the words "treat the negotiations as ended" the words "and withdrew his promise in such a way as to notify plaintiff," the same as stated by the court in the modified instruction given, the instruction requested would have been unobjectionable. The proviso added by the court in the modified instruction was un-

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necessary, and, as stated, was unquestionably erroneous; but from a consideration of the whole case we do not regard this error as sufficient to cause a reversal, for the reason that it does not affect materially the substantial rights of the appellant.

The fifteenth and sixteenth specifications were the refusal of the court to give certain instructions requested by appellant. The first goes to the question as to whether a contract had been made, and the instructions which had already been given by the court, in our opinion, had fully covered that question. The second does not cover any question contained in the contract, or issue made in the pleadings, and both were properly refused.

The seventeenth specification was the alleged error of the court in giving certain instructions, which have already been considered under previous specifications.

The eighteenth specification was the refusal of the court to grant a new trial. We think the judgment of the court in refusing a new trial was correct, and therefore the judgment should be, and is hereby, affirmed.

RAYMON, C. J., and CLAYTON, J., concur.

STATE ex rel. MORTON et al. v. BACK et al.

(Supreme Court of Nebraska, Oct. 5, 1904.)

[100 N. W. Rep. 952.]

Railroads—Taxation—Assessment by State Board—Conclusive to City Officer.

In the assessment of railway property for municipal purposes situated in cities of the metropolitan class, such as is required to be listed with and assessed by the State Board of Equalization for general revenue purposes under the provisions of sections 39 and 40 of chapter 77, art. 1, Comp. St. 1901, as existing prior to the revenue act of 1903 (Cobbey's Ann. St. 1903, c. 49), it is made the duty of the tax commissioner or assessor of such city to accept the values of the fractional part of such railroad property situated in the municipality as the same is valued and assessed by the State Board of Equalization, and apportioned to such city in accordance with the provisions of said act.

Same—Same—Same—Municipal Taxation.

The proportional share of railway property as valued and assessed by the State Board of Equalization belonging to and situated in such city and subject to taxation for municipal purposes may be equalized by the proper authorities of such city by lowering or raising the value of the same, as thus ascertained, so as to bring about uniformity of valuation in respect of all property subject to taxation within the municipality.

Same—Same—Constitutional Law—Distribution of Valuation.

It is competent for the Legislature to provide for the valuation and assessment of the property of railway companies such as is required to be listed and scheduled with the Auditor of Public Accounts by sections 39, 40, c. 77, art. 1, Comp. St. 1901, as heretofore existing, by one assessing body, and for ascertaining the value of the whole of such property of any one railway corporation subject to taxation

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in this state as a unit or as an entirety, and to distribute the value as thus found over the main line or track of such railway company and to the different taxing districts, municipalities, etc., on a mileage basis.

Same—Same—Same—Same—Uniformity.

Such a scheme or plan of assessment and taxation of the property of railway companies as therein provided for state, county, and municipal purposes does not violate the provisions of the fundamental law commanding uniformity in the valuation and assessment of property for the purpose of raising needful revenues by the levying of a tax upon all property subject thereto according to its value.

Same—Same—Same—Same—Changing Situs of Property.

The valuation and assessment of the property of a railway company, as therein provided, as an entirety, and the distribution of the value thus ascertained upon a mileage basis over the entire line of such railway, does not operate as a changing of the situs of the property assessed. Its effect is only to distribute the value of an organic whole to the fractional parts situated in the different subordinate taxing districts through which the line extends and in which the property is actually situated, which is a legitimate exercise of legislative power.

Same—Same—Same—Same—Assessment of as Personalty.

In the assessment of railway property for taxation as therein provided, it is competent for the Legislature to classify such property, and provide for the assessment of the same as personalty, and to fix the situs of the property assessed by providing for the valuation of the property as an entirety and the distribution of the total value to each taxing district, according to the number of miles of main track located therein.

Same—Same—Due Process of Law.

Said sections 39 and 40, as existing prior to their repeal by the revenue act of 1903 (Cobbey's Ann. St. 1903, c. 49), are not invalid as taking property by taxation without due process of law. *Chicago, B. & O. R. R. Co. v. Richardson County*, 100 N. W. 950, followed. (Syllabus by the Court.)

Application by the state, on the relation of George T. Morton and others, for a writ of mandamus to Peter M. Back and others. Writ denied.

T. J. Mahoney, for relators.

C. C. Wright, for respondents.

HOLCOMB, C. J. This action is begun in this court in the exercise of its original jurisdiction. The relators pray for a peremptory writ of mandamus to compel the respondents, the city council of Omaha, acting as a board of equalization, to reassemble and hear their complaint relative to the alleged low assessment of certain railroad properties situated within the corporate limits, and to equalize the assessment of such properties by raising the assessed value thereof to conform to the standard of value pertaining to all other property assessed for municipal purposes. The substance of the complaint is that the properties of the railroad companies mentioned in the alternative writ, situated within the city limits, are assessed at but a fraction of their true value, while all other property subject to municipal taxation is assessed at its commercial value. The return of the re-

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spondents to the alternative writ discloses that in the assessment for municipal taxation of the railroad properties complained of the assessing officer of the city accepted the valuations placed thereon by the State Board of Equalization and the distributive share thereof apportioned to the city of Omaha as the assessable value of such properties, and that in the equalization thereof the respondents, acting as a board of equalization, raised the assessments five times the value as fixed by the State Board of Equalization and returned by the city tax commissioner, which act of equalization, in the judgment of the board, brought the value of the railroad properties thus assessed to a uniform standard of value with other property assessed for municipal purposes, and exhausted their powers in the premises. Reduced to its narrowest limits, the question presented for consideration by the pleadings and in briefs of counsel is in respect of the method of procedure by the tax commissioner and the city council in the assessment of railroad properties situated in part in such municipality and subject to municipal taxes, and also whether the statute providing for the assessment of railroad property as a unit, and distributing the aggregate value to the different counties, townships, cities, and towns through which the lines run on a mileage basis, is in harmony with the fundamental law. The validity of such legislation is especially called in question when applied to the taxation of railway property in the city of Omaha for municipal purposes.

The legal questions presented, says counsel for relators, are, first, have the respondents correctly interpreted the statutes; and, second, are the statutes in question valid? The answer to the first question must, we think, be in the affirmative. The old revenue act under which the assessment in question was made, provided for the assessment of railroad property of the character under consideration by one assessing body, viz., the State Board of Equalization, for all purposes of taxation, state, county, township, school district, and municipal. This assessing body, the statute declares, shall value and assess the property of railroad corporations at its actual value for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of such road or line. It is further provided that after the valuation and assessment is made as aforesaid the State Auditor shall certify to the county clerks of the several counties in which the properties of such corporations are situated, or any part thereof, the assessment per mile so made on the property of such corporations, specifying the number of miles and the amount in each of said counties. Section 40, c. 77, art. 1, Comp. St. 1901. By section 98, c. 12a, Comp. St. 1901 (Cobbey's Ann. St. § 7547), the same being the charter act of cities of the metropolitan class, to which the city of Omaha be-

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longs, it is provided that "the tax commissioner shall take the valuation and assessment of railroad property within the city limits from the returns made by the State Board of Equalization to the county clerk." Assuming, as we do for present purposes, that the Legislature may rightfully provide for the assessment of the property of a railway company by one assessing body, and as one property or as a unit, and apportion the value thereof on a mileage basis, then, as we view the subject, it is not only manifest that the Legislature intended, but that it is quite appropriate that the distributive share belonging to any one taxing district should be taken and accepted as the assessable value of that part of the whole property which is situated in such district, and which shall be subject to taxes as all other property therein. There appears to be no fundamental objection to such an assessment. The assessment thus made and returned would, doubtless, be subject to the authority and power of a board of equalization to raise or lower the value so as to comply with the rule of uniformity and conform to values generally obtaining in such taxing district. In all schemes of taxation there are generally recognized elements of inequality and the probability of erroneous valuations in the assessment of property by whatever mode the assessment may be made. The evil is usually remedied by the exercise of the authority of a board created for that purpose, whereby the assessment of different properties is brought to a common standard of value. Different precincts have different assessing officers, and these different officers, we know by common experience, widely differ in their valuation of property of approximately the same value. This difference of opinion and judgment necessitates the establishment of a tribunal having authority and jurisdiction to equalize values and bring all property to a common standard of valuation, to the end that each item and class may bear its just and equitable share of the burdens of taxation. A question somewhat akin to the one under consideration was raised in *State ex rel. Prout v. Aitken*, 62 Neb. 428, 87 N. W. 153, and the propriety of assessments of railroad properties by the State Board of Equalization and the acceptance of the valuation thus ascertained for purposes of municipal taxation was recognized and sanctioned. In upholding a law providing for such method of assessing railroad property situated in a municipality for municipal purposes, the court, among other things, in the opinion says: "The Legislature, in its wisdom, has decided that the value of railroad property can be more accurately and justly estimated by the State Board of Equalization than by local assessors, and has exercised its constitutional prerogative by providing that railroad property shall be assessed in that manner. Whether or not it is reasonable to suppose that the State Board of Equalization would have more knowledge and a better opportunity to make a just valuation of such property

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than local assessors is quite unnecessary to be determined in deciding upon respondent's right to act as tax commissioner. Why may not several values constitutionally act upon different kinds of property, or upon the same property, for the purpose of different taxes? The real objection to this act on the ground of uniformity is, evidently, the idea that value is not such a fixed quantity that it is possible for two independent appraisers to agree. If values are fixed for purposes of municipal taxation by one body of assessors, and for county and state by another, it is practically certain that the two will disagree. Enough is said above to indicate an opinion that the only uniformity required as to any tax is that it should be uniform throughout the jurisdiction; i. e., that state taxes shall be uniform throughout the state, county taxes throughout the county, and city taxes throughout the city." The result produced by this method of assessment is only that there are different assessing authorities for different kinds of property, each exercising an independent judgment in arriving at the value of the property assessed, and making due return thereof to the proper authorities. The inequalities in values thus returned, if any there be, is a proper subject for consideration by a body or tribunal authorized to discharge the functions of a board of equalization. If it be proper to assess railroad property as a unit, and distribute the total value thereof on a mileage basis, it is obvious that the distributive share going to any one taxing district may be required to be taken as the assessable value and as the basis of valuation for equalization and taxing purposes. The value of such distributive share of the whole property may, it would seem, be raised or lowered by an equalizing board in order that it may be brought to a common standard and conform to the values placed on all other property. This, as we understand the record, is what was done by the respondents in the case at bar, and, if so, is, we think, in harmony with legislative intentment. It is the business of such boards, says this court in *State v. Fleming* (Neb.) 97 N. W. 1063, "to fairly and impartially equalize the valuation of all personal property assessed to their respective jurisdictions, and raise or lower the same as the justice and equity of the case may require. Whatever directions the law may give to the assessor in valuing the property in the first instance, and whatever result these directions may produce in the assessment of franchises or other property of the taxpayer, the work of the board of equalization is to equalize the valuations made so that every one, as nearly as that may be attained, shall stand upon an equal footing, and pay a equal proportion of the tax laid according to the real value of his property. * * * In this way equity is attained, and every interest protected." It is manifest that the legislative plan for the assessment of railroad property situated in a municipality, for municipal purposes, has been

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followed by the city authorities in the case at bar, and that the interpretation given to these several provisions of the statute by the respondents as to their authority and power is in harmony with the expressed will of the Legislature.

The very able and helpful arguments and briefs of counsel on both sides of the controversy are devoted almost exclusively to the second question presented—that is, the alleged invalidity of the statutes providing for the assessment of the property of a railroad company as a unit, and the distribution of the value of the whole on a mileage basis by one assessing body for all purposes of taxation—and it is to this phrase of the case that we have given the fullest consideration and most thorough research at our command. It is the contention of counsel for relators that the provisions of the fundamental law governing taxation are violated in the assessment of railroad property for municipal purposes by the plan adopted and prescribed by the Legislature. It is argued that railroad properties of great value located within the corporate limits of the city of Omaha pay taxes on but an insignificant part of the true value; that these properties escape a large share of municipal taxes for which they should be justly burdened and made to contribute to the revenues of the city in return for the protection received in the administration of the affairs of the municipality in which they are situated. Counsel says that here are located costly depots and terminal facilities, including real estate of vast value occupied for such purposes, which ought to respond to municipal taxation according to such values, to be ascertained with reference to the actual location of such properties as if separate and independent properties, and without regard to their relation to and connection with the entire lines of railway of which they form a part. The right and power of the Legislature to provide a scheme of taxation for municipal purposes by an assessment of railway property as an entirety and the distribution of the aggregate value on a mileage basis is boldly challenged, and we are asked to so construe the constitutional provisions relating to the subject as inhibiting such a plan and method of taxation of such properties for municipal purposes. "Our complaint," says counsel, "is not that the Legislature has provided a different method of assessing railroad property from that provided for assessing other property, but rather that under the statutes relied upon by respondents a result is obtained which violates the constitutional requirement of uniformity." If, it is said, the Legislature had provided for assessing the property of railroads extending into more than one county by determining the value of the railroad as a whole, and then apportioning such value to the several tax districts in proportion to the real values in the several districts, rather than in proportion to the number of miles of main line, such a method would at least be theoretically correct; but that,

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when the apportionment of the total value is according to the number of miles of main line in any one taxing district, there is an ignoring of the question of value altogether. The mandate of the Constitution, it is insisted, is imperative that in every taxing district every owner shall pay a tax in proportion to the value of the property in the district, and not the extent of it. The constitutional provisions principally relied on by relators in support of their contention are found in section 1 of article 9, which declares that revenues are to be raised by levying a tax by valuation so that every taxpayer shall pay in the proportion to the value of his, her, or its property subject to taxation, the value to be ascertained in such manner as the Legislature shall direct. The necessity for uniformity and equality in taxation is emphatically expressed in *State v. Osborn*, 60 Neb. 415, 83 N. W. 357, wherein it is said: "And this rule of uniformity applies not only to the rate of taxation, but as well to the valuation of property for the purpose of raising revenue. The Constitution forbids any discrimination whatever among taxpayers. Thus, if the property of one citizen is valued for taxation at one-fourth its value, others within the taxing district have the right to demand that their property be assessed on the same basis. The rule of uniformity is satisfied if observed by each jurisdiction imposing the tax." To the same effect is *High School District v. Lancaster County*, 60 Neb. 147, 82 N. W. 380, 49 L. R. A. 343, 83 Am. St. Rep. 525. See, also, *State v. Poynter*, 59 Neb. 417, 81 N. W. 431, and *State ex rel. Shriver v. Karr*, 64 Neb. 514, 90 N. W. 298. By section 6 of article 9 of the Constitution it is provided that for corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform with respect to persons and property within the jurisdiction of the body imposing the same. The requirements of uniformity in the assessment of property for municipal purposes generally is doubtless the same, and as obligatory under the provisions of section 6 of article 9 as that required by the provisions of section 1 of the same article; and it is so held in *State ex rel. Bee Building Co. v. Savage*, 65 Neb. 714, 91 N. W. 716. The construction given to the first section in the several decisions of this court which we have cited apply with equal pertinency and force to those of section 6. Uniformity with respect to person and property requires that the tax rate must be the same as to all persons affected, and the valuation of the property must be upon the same basis throughout the entire taxing jurisdiction. A departure either as to rate of levy or as to the standard of valuation of the different properties subject to taxation would violate the rule of uniformity demanded by the Constitution, and render ineffectual legislation authorizing such a method of procedure in the levying and collection of municipal taxes. It is equally clear that, if property within

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a municipality having a fixed legal situs therein, was by a scheme or plan of assessment to escape in whole or in part municipal taxes upon a valuation in substantial conformity with all other property within the taxing district, this would be a violation of the provisions of said section 6. May the Legislature, without infringing on these provisions of the fundamental law, provide for the assessment of the property of railway companies such as is required to be included in the schedules to be returned to the state assessing board upon the unit plan or system, and distribute the value of the whole property along the line of the road thus assessed, and to the different tax districts, on a mileage basis? It is earnestly contended by the relators that the several railroad companies having lines in the city of Omaha have valuable terminal facilities, depots, and other properties on their right of way and side tracks which have a fixed and actual physical situs, and as such are subject to local taxation upon such values, and that by the distribution of the total value of any one road over the entire line on a mileage basis is to withdraw from taxation for municipal purposes property situated within the municipality, thereby resulting in a violation of the provisions of the Constitution that all property shall bear its just share of tax burdens of the taxing jurisdiction in which it is situated. In a sense it is no doubt true that the properties of the large railway corporations doing business in this state with extensive terminal facilities, switching yards, depot grounds, and costly structures in the large cities and towns are much more valuable, mile for mile, than a corresponding length of the roadbed and right of way situated outside of such municipalities, consisting usually of but a single track and roadbed and the right of way of from 100 to 200 feet in width. In a legal sense, however, must it be said that the property thus situated is so localized that its situs for the purpose of taxation must be the same as where physically situated, and that any attempt to throw it with the whole mass of property with which it is connected, and of which it forms a part, and assess it as an entirety, and distribute the value on a mileage basis, contravenes the fundamental law?

We may assume that all the lines of railway in this state have been by the State Board of Equalization assessed at a valuation uniform with the values placed on all other property assessed for revenue purposes, and that the total value of each of such lines of railway has been distributed to the different counties, townships, school and road districts, cities, and towns through which such lines extend according to the length of the line in each division for whose benefit taxes are levied. If those portions of the road lying in the city of Omaha are to be valued at a larger sum per mile than other portions of the same line, then it follows that there must be a corresponding reduction of the amount apportioned to

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the remainder of the line, or else an overvaluation and double taxation would be the result; and this would violate the rule of uniformity the same as does undervaluation. The legislative plan contemplates a full valuation of all property of a railway line subject to taxation in this state, and the distribution of that value equally over each mile of the line, and with equal benefit to every taxing district through which it extends. The relators contend for a method of taxation that recognizes differences of value of different parts of the same line, a localization of such property for taxation, and an apportionment of values accordingly as necessary to meet the demands of the constitutional requirement of uniformity. It is not for us to say that the method adopted by the legislature is the most approved, and comes nearest reaching an ideal state in the levying and collection of the public revenues. Yet it is quite true that this plan has been warmly commended by courts of last resort of many of the states and of the United States as best calculated to more nearly approach perfect uniformity than any other plan that has heretofore been devised. It may be, and possibly is, true that legislative provisions might be enacted in the interest of more just and equitable taxation that would allow some latitude on the part of an assessing body clothed with the power to value and assess railway property to vary the value of different parts of a railway line in the distribution of the value of the whole to conform to the improvements made and character of the property assessed in the different localities through which the right of way and roadbed extends. It is, however, for us to determine only as best we may whether the plan of valuing and assessing railway property as adopted by the Legislature is in conflict with fundamental law. The courts have generally recognized that upon legal principles and as a practical question the properties of a railroad company, because of their peculiar character, can best be assessed by one assessing body, and cannot with any degree of satisfaction be left with local assessing officers. The wisdom and necessity for a taxing body having authority and jurisdiction over the territory covered by all the property of a railroad company and with power to assess the whole of such property, and to fix values which would be uniform over the different lines of railroads to be assessed, seems so apparent that argument can scarcely add anything. At least, the wisdom and experience of those having to do with the subject of taxation have in very many of the states of the Union brought about plans for the assessment of properties of this character by one assessing body, and this method is now quite generally resorted to as the best solution of a difficult problem of railroad taxation. As to those properties which have no fixed situs, such as the rolling stock, franchises, and other intangible property, it is difficult to conceive of any more just or equitable scheme or plan than to

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find the value of the whole and distribute the same throughout the different taxing jurisdictions according to the distance of the line of road situated in each district for whose benefit taxes are levied. In a measure, this same principle, it is manifest, obtains in respect of the line of a railroad, including all properties necessary and used in its operation in the accomplishment of the objects of its incorporation. Carried to its logical conclusion, the contention of the relators would require the assessment of every fractional part of a railroad within any taxing district as separate and independent property, the aggregate of these several values representing the value of the entire property within the state. No two miles of a railway system, if regard be had solely to the real estate composing the roadbed and right of way, the cost of construction, and the value of the superstructures and buildings thereon necessary for the operation of the road, would be exactly the same. Each taxing district would have located therein property of a value peculiar to itself and to no other, and, if the rule of uniformity be observed, an assessment must be made of such property according to its value as thus localized. Must all railway property be thus localized for the purposes of taxation? The assessment of the property, which is the subject of the present controversy, and the validity of which is challenged, was made by the State Board of Equalization under the old revenue act (Comp. St. 1901, c. 77, art. 1). The provisions assailed are found in sections 39 and 40 of the act. The provisions of the new revenue act (sections 10,484, 10,485, and 10,486, Cobbey's Ann. St. 1903) in regard to the questions herein being considered are believed to be in all material respects the same as the provisions of the old law. By section 39, art. 1, c. 77, Comp. St. 1901, it is made the duty of certain officers of every railroad company doing business in this state and having property therein subject to taxation to file schedules under oath of the property of such company with the State Auditor at a time as therein stated. The schedule is required to disclose the number of miles of such railroad in each organized county, and the total number of miles in the state, including the roadbed, right of way, superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock, and personal property necessary for the construction, repairs, or successful operation of such railroad lines; "provided, however," says the statute, "that all machine and repair shops, general office buildings, store houses, and also all real and personal property, outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad and telegraph companies shall be listed for purposes of taxation by the principal officers or agents of such companies, with the precinct assessors of any precinct of the county where such real or personal property may be situated,

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in the manner provided by law for the listing and valuation of real and personal property." By the succeeding section authority is given to the State Board of Equalization to value and assess all property required to be listed and returned to the Auditor of Public Accounts at its actual value for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of such road or line. It is also made the duty of the Auditor to certify to the county clerks of the several counties in which the property of the corporation or any part thereof may be situated the assessment per mile so made on the property of such corporation, specifying the number of miles and amount in each of such counties. The value of the whole, when ascertained, is by this method apportioned to the several counties, townships, cities, and villages and other subdivisions through which such railway line extends according to the number of miles of railroad situated in such subdivision. It is further declared that all such property shall for the purpose of taxation be deemed "personal property," and placed on the tax lists as thereafter provided. It will be observed that in the assessment of railroad property under this statute no property located off the right of way is assessed by the state board, and that there are certain exceptions as to property, which is specified, which is situated on the right of way. It is only the lines of railways, including superstructures, appurtenances, and property on the right of way necessary to the successful operation of the road, and the rolling stock and franchises, that are required to be assessed by the state board as a unit.

In *Adams County v. Kansas City & O. Ry. Co.* (Neb.) 99 N. W. 245, this court had occasion to construe the language of the proviso found in section 39, and it is there held that the phrase "outside of said right of way," etc., qualifies only the word "property" immediately preceding it, and not the specific terms used in the enumeration of other property therein. Accepting this as a correct construction, as we do, and keeping in view the entire act relating to the subject, it becomes obvious that the legislative intentment was to enlarge the situs of the property of a railway company necessary for and used in the construction of its lines and the prosecution of its business so as to cover the entire line of its roadbed and right of way. All of this property is so intimately related to each of the different parts, and so connected together, that it is, it seems, appropriate and legal to so treat and regard it when fixing its value for assessment purposes and apportioning the value to the different tax districts through which the road extends. A clear understanding of the character of the property of a railway company, which the statute requires to be valued and assessed as a unit and the value distributed on a mileage basis, is nec-

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essary to an intelligent understanding and application of the principles underlying the taxation of this species of property and of the decisions of the courts of other states relating to the subject. The Supreme Court of Tennessee, in the cases of *Chattanooga v. Railway Co.*, 7 Lea, 561, and *Railroad Company v. Franklin County*, 12 Lea, 521, by its opinions therein comes nearest supporting the contention of counsel for relators, and yet these cases are, we think, clearly distinguishable, and are not authority of a decisive character in the determination of the questions as presented in the case at bar. In the first case cited all the property of whatever description, and wherever situated, was for the purpose of taxation under the statute being considered to be thrown together as a unit, or as one property, valued as a whole, and the value distributed on a mileage basis. In the latter decision of that court judicial sanction is given to the validity of an assessing statute very similar to the one under consideration, except that it was held that depots have a local situs, and should be assessed accordingly. But the reasoning by which this conclusion is reached, as counsel well says, is somewhat bewildering. In a discussion of the character of railroad property required to be assessed by the State Board of Equalization and the reasons for legislation providing for the assessment of such property as a unit, the total value thereof to be distributed on a mileage basis, this court has expressed itself in *Chicago, B. & Q. Ry. Co. v. Richardson County*, 61 Neb. 519, 21 Am. & Eng. R. Cas., N. S., 702, 85 N. W. 532, as follows: "The common-sense view of the subject would seem to be that such purpose was to enable the proper authorities to distribute the avails of such taxation equitably among all the municipal subdivisions through which a road may pass in the ratio which the number of miles within each subdivision bears to the total number of miles of the road within the state, treating each mile as equal in value to every other mile, and regardless of whence came the power under which any particular portion of the road is constructed. A railroad might have vast terminals at one point, worth as much as the remainder of the line, though it extended through a dozen counties. The subdivision in which these terminals are located is not, under this law, permitted to reap an advantage over other localities, by reason of the mere accident of location, but must share its advantages with these others pro rata. That evidently is the reason behind and under this legislation. How a franchise has been acquired, or whether a particular portion of a line is more expensive to construct than others, is unimportant in determining whether the property should be taxed locally or otherwise. As a matter of fact, this inequality of value was the principal motive for the legislation, which sought to obviate the evils attendant upon such a state of facts. Without such inequality, no legislation would have been nec-

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essary, the general laws being in that event adequate for the purpose." While the constitutionality of the statute was not directly involved, the discussion of the subject is valuable as showing the reasons for treating and assessing railroad property as a unit, and the difficulty of separating it into fractional parts, each piece, for the purpose of assessment, to be localized, and treated as a specific item of property having a value independent of the other portions of the whole. In *Cooley on Taxation* (3d Ed.) vol. 1, p. 633, it is observed by the eminent author: "The property of railroad and canal companies constitutes a legitimate class of property for the purposes of taxation; a class which, in order to treat it fairly in the matter of taxation, must be treated separately. Indeed, the difficulties of assessing, in the same way that property in general is assessed, lines of railroad extending through many municipalities, are so great and so obvious that in many states it is not attempted, and a franchise tax is imposed as a substitute for all other taxation. But in other states a railroad is listed, assessed, and valued as an entirety, and the value is then apportioned for taxation among the several municipalities by some standard prescribed by law, which generally is the length of line within the municipalities respectively. There is no constitutional objection to that method of taxing this species of property, and it is perhaps more just than any other."

The Supreme Court of Colorado, in the case of *Ames v. People*, 56 Pac. 656, in passing upon a controversy identical in principle with one in the case at bar, upholds the validity of statutory enactments providing for one body to value and assess all the property of a railway company as a unit, and to distribute the value upon a mileage basis. The constitutional provisions as to uniformity in that state, while not the same, are substantially so in principle, and the necessity for equality of taxation is recognized in the decision rendered. In the opinion it is said: "In the method of laying a tax, either as to the assessment or the apportionment, the General Assembly is not restricted by the Constitution; and, unless the legislation is palpably unjust, oppressive, or inadequate, courts will not substitute their judgment for that of the Legislature. Many tribunals of final resort, including the Supreme Court of the United States and our own court, as will be seen from the cases already cited, have held that the method of ascertaining and distributing values of railroad property like that prescribed in the statute under consideration, if not the only rational one, is at least the best and fairest thus far invented." And further on in the same opinion the court treats the subject in the following manner: "It follows that, in order to secure a just valuation for taxation of this class of property, all of it that is used for the convenient and proper operation of the railway may be assessed as a unit, and the valuation thus ascertained may be apportioned to the various taxing

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districts upon a mileage basis. Indeed, construing, as we should, sections 3 and 10 together, such of the property of a railroad company, real and personal, as is used for the convenient and proper operation of its railway, can properly only be assessed and apportioned for taxation as a unit; and the apportionment upon a mileage basis, as this act prescribes, will come as near to doing exact justice as it is possible to do. * * * This method of apportionment, in our judgment, gives to each local taxing district its just proportion of tax; that is to say, each taxing district gets for purposes of taxation the just valuation of the property physically situate within its territorial limits, for the value of property situate therein cannot be made to depend upon its so-called natural situs, entirely disassociated from the use made of it. But that value in great measure depends upon its connection with every other part of its corporation property so used, and situate in every other taxing district in which any part of its railroad lies, considered always in connection with the character of the use made of it. Thus the command of the Constitution is obeyed, and in fact to each taxing district is given a fair valuation of the railroad property within its territorial limits; and that is all the section requires." Says the Supreme Court of Michigan: "The propriety of treating aggregations of property as a unite is as natural and proper for the purposes of assessment as for sale, and this is especially so where the various articles are so essential to the purpose for which they are combined that the withdrawal of one or any class would destroy, or substantially impair, the use of all for the purposes to which in their new form they are adapted." *Detroit Citizens' Street Railway Company v. Common Council*, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589. In *People ex rel. v. State Board of Equalization*, 205 Ill. 296, 68 N. E. 943, it is said: "The right of way of a railroad company cannot be cut up, for the purposes of assessment, into parts, either by dividing it into sections by the lines of the different taxing bodies which it crosses or by severing from its main track the portions that lie outside of some arbitrary line drawn through the center of the right of way. A railroad is a unit, and for the purposes of assessment its right of way must be treated as a whole. The switch or side track at which it receives coal, grain, stock, or freight in a country village is as essential to the successful operation of the road as is the switch or side track in the city at which the articles which it handles as a common carrier are discharged; and the land upon which its side or second track and turnouts, and its station, machine shops, roundhouses, etc., stand, is as necessary to the successful operation of the road and as much a part of its right of way as the land upon which its main track is laid; and the value of each piece of its right of way must be determined

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by taking into consideration the value of the entire right of way, rather than the value of each piece for commercial purposes wholly disconnected from the use to which it has been applied, as compared with contiguous property used for purposes other than right of way." Many other authorities could be cited, but the foregoing give a very accurate idea of the trend of judicial opinions regarding the propriety and legality of this method of assessing the property of railway companies. The principles justifying the assessment of railroad properties as a unit, and distributing the value on a mileage basis to the different tax districts through which the railway line or track extends, seem to be that in fact and in legal contemplation for the purpose of assessment, use, and sale such property may rightfully be regarded as a physical whole or one entire property extending over the whole line of the railway, the value of which depends not on any separate or fractional part, but upon the whole of the property as an entirety.

The fundamental idea underlying the relators' contention as to the proper method of local taxation of these properties is that the fractional parts of the different railway companies located in the city of Omaha consisting of the depot grounds, main track, and side tracks, and the structures thereon, have a fixed and natural situs, and that they are of themselves of especial value greatly in excess of other portions of equal length of the lines of which they are parts, and that such values are separable from the remainder, and therefore, to meet the requirements of the Constitution as to uniformity, and to the end that all property shall bear its just proportion of the burdens of taxation in the district where it is situated, these properties should be localized in the taxing district in which they are physically situated, and assessed upon their separate values for municipal purposes. Of course, if we assume that such properties have a legal situs and an ascertainable value of themselves within the limits of the municipality, separate and apart from the remainder of the line, and are possessed of a greatly enhanced value over other portions of the main track of equal extent, the contention of relators is conceded, and there is left no room for discussion or argument.

The principle underlying the legislation complained of undoubtedly is that every portion of the property of a railway company going to make up the whole is interdependent, and that the situs must be determined with respect to the entire property, and not any fractional portion of it. The Legislature has fixed or undertaken to fix the legal situs of a railroad where the organic structure is, in all the counties and subordinate districts through which the road is constructed, and has provided for the apportionment of a share of the total value to each taxing district in proportion to the length of the main track in such district, upon which taxes

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are to be levied for all purposes. It is the fractional proportion of the whole distributed to any one taxing district that represents the taxable property of such railway line in such district, rather than the physical property found therein. This method does not effectuate a moving about of property having a fixed place of location—a change of situs—but amounts only to the valuing of the whole as a unit, and the distribution of the total value along the line and throughout the extent of the physical property on what is regarded as a fair, just, and equitable basis. The nature and characteristics of the property is such as to render it incapable of division into fragmentary parts and the valuing of each of such parts for assessment purposes as though it were a separate and distinct item of property having a location in a particular taxing jurisdiction. These properties have no market value when considered in fractional parts. Railroad properties are bought and sold as an entirety. The real estate on which the right of way is located cannot be valued in a commercial sense as so many acres, or as lots and blocks, since its value in such cases is determined in a large measure by reason of the use to which it is put, and the improvements thereon, and then only in connection with the other property of which it forms a part. The Legislature has declared that the property of railroad companies required to be valued and assessed by the State Board of Equalization should, for the purposes of levying and collecting taxes, be regarded as personal property. If this legislative declaration is to be given force, then the right to enact and the validity of the enactment providing for a distributive valuation on a mileage basis would necessarily follow. There will, we apprehend, be no serious contention against the power of the Legislature by rule of law to fix the situs of all such property (if it may be regarded as personalty) for purposes of taxation. In *Railway Co. v. Board*, 59 Pac. 383, the Kansas Court of Appeal says: "Under paragraph 6873, Gen. St. 1889, all property used or held by a railway company for the purpose of operating its railroad, including its roadbed, right of way, etc., is to be appraised and assessed as personal property. The statute declaring such property personal property for the purposes of assessing a tax against it, it follows that such tax must be collected as a tax upon personal property. * * * The Legislature had the power to enact the statute declaring the right of way, roadbed, and other property held or used in the operation of the railroad to be personal property for the purposes of taxation." In *Ames v. People*, supra, the court says: "The whole argument, however, is based upon the proposition that the property is assessed not where it is physically situated, but all along the main track, each municipal corporation being given for taxation a value dependent not upon the actual value of the property therein physically located, but only such value of the entire property of the corporation

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as the length of the main track in the municipality bears to the total length of the line. This method of distribution is said to be contrary to the rule that property must be taxed at its actual situs. But it is settled by a long line of decisions that this rule is merely the law of the state that recognizes it; hence, being a matter of Legislation, it is entirely competent for the Legislature, unless restrained by the Constitution, to fix, for the purposes of taxation, the situs of both real and personal property." The Arkansas Supreme Court, regarding a similar question, states the principle as follows: "The nature of the property justifies classification and separation from the body of the real estate upon the grounds that justify the separate classification of realty and personalty. The requirement of an annual assessment of railways affords, therefore, no greater cause for complaint than does the like requirement for personal property, and the complaint of discrimination is groundless." *Railway Co. v. Worthen*, 13 S. W. 254, 7 L. R. A. 374. The Supreme Court of the United States in *Railway Co. v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. Ed. 238, has said: "The roadway itself of a railroad depends for its value upon the traffic of the company, and not merely upon the narrow strip of land appropriated for the use of the road and the bars and cross-ties thereon. The value of the roadway at any given time is not the original cost, nor, a fortiori, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put and the character of the improvements upon it. The assessable value, for taxation, of a railroad track, can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road." Again, it is said by the Supreme Court of Wisconsin in *State ex rel. St. Ry. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746: "The utter impracticability, not to say impossibility, of treating it as real estate for the purposes of taxation, is illustrated not only from the results that might follow tax sales, but in attempting to assess it as such under the provision that 'all real property not expressly exempt from taxation shall be entered upon the assessment roll in the assessment district where it lies,' and is well illustrated by the present case, where the property claimed to be real estate has a physical location in twenty-one assessment dis-

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tricts. How could it be entered on the rolls by lots and blocks, or by reference to plat or deed, or how, otherwise, under sections 1045 and 1046 [Rev. St. 1878]? It is part on and part in the soil and part in the air. How are the twenty-one assessors to assess and value the tracks, ties, poles, and trolley wires, etc., with certainty, and in an intelligible manner, in so many parcels? And are the twenty-one assessments to be followed by as many separate taxes and tax sales in case of nonpayment? It seems to be entirely clear that this property cannot be regarded as real estate for the purposes of taxation, and that it is not the 'land' and 'real property' described in these sections for assessment and taxation; and, as already stated, it seems perfectly plain from the statute that this property is required by law to be assessed and taxed. * * * In view of the use made of the specific lots upon which the power houses are situated, and upon a fair construction of the statute, and with a view to carry out its evident meaning, we hold that such real estate, thus devoted to such uses, is not the real property required by section 1039 [Rev. St. 1878] to be 'entered upon the assessment roll in the assessment district where it lies'; it having acquired a peculiar character in the law by reason of having become a part of the entirety of a property, subject only to assessment and taxation as an entirety in the assessment district where the corporation owning it has its principal office and place of business." We are satisfied upon principle and authorities cited that the Legislature has not exceeded its powers in providing, as it has done, for the assessment of the property of a railway company as a unit, and the distribution of the value thus ascertained over the entire line of the railway assessed, and to the different tax districts and municipalities into which the roadbed or right of way extends on a mileage basis; that when the values are thus ascertained and apportioned, and the distributive share assigned to any one district or municipality, such proportionate share legally represents the value of the fractional part of the entire property situated in such district or municipality for the purposes of municipal taxation, and that the fundamental law as to uniformity is not violated by such a scheme of assessment and distribution of values of the entire property.

It is also contended that the sections of the statute providing for an assessment of railway property by the State Board of Equalization is void because of the alleged deprivation of property by taxation without due process of law, in that no sufficient notice is given of the meeting of the State Board of Equalization when assessing such property. This question has been under consideration for some time, and is disposed of in an opinion in the case of Chicago, B. & Q. Ry. Co. v. Richardson County (No. 13,045, filed herewith) 100 N. W. 950. On the authority of that decision these sections in re-

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spect of the objection urged against them, of which we have just made mention, must be held valid. The constitutionality of these sections is also upheld in that opinion as to other objections herein discussed.

The application for a peremptory writ of mandamus should be denied, which is accordingly done. Writ denied.

ILLINOIS CENT. R. CO. v. TRUSTEES OF SCHOOLS OF TP.
9 S., R. 2 W., THIRD P. M., JACKSON COUNTY.

(Supreme Court of Illinois, Oct. 24, 1904.)

[72 N. E. Rep. 39.]

Injuries to Abutting Property—Operation of Railroad near Schoolhouse—Elements of Damages—Instructions.*

In an action by the school trustees for damages arising from the operation of a railroad about 200 feet from the schoolhouse, refusing to strike out evidence as to improper elements of damages, such as obstructions to view, danger of children being injured on the track, attracting attention of children by passing trains, etc., was error.

Same—Same—Same—Same.

In such case, an instruction that there could be no recovery for obstruction of view, or danger of children going on the track, did not cure the erroneous admission of such evidence.

Same—Same—Same—Vibration.*

In an action by school trustees for damages resulting from the operation of a railroad near a schoolhouse, there can be no recovery for the vibration of the ground caused by passing trains, without evidence of actual damages.

Appeal from Appellate Court, Fourth District.

Action by the trustees of schools of Township 9 south, range 2 west, third P. M., in Jackson county, against the Illinois Central Railroad Company. Plaintiffs had judgment, which was affirmed by the Appellate Court (112 Ill. App. 488), and defendant appeals. Reversed.

Sidney F. Andrews (J. M. Dickinson, of counsel), for appellant.

James H. Martin, for appellees.

CARTWRIGHT, J. This action on the case was brought by the appellees, the trustees of schools, for the use of School District No. 2 in the city of Murphysboro, against appellant, in the circuit court of Jackson county, for damages to a tract of land containing two acres, in said city, on which there is a two-story brick schoolhouse occupied for a graded school,

*As to what are the elements of damages to abutting or adjacent property from the construction and operation of railroads and street railways, see *South Bound R. R. v. Burton* (S. Car.), 10 R. R. R. 147, 33 Am. & Eng. R. Cas., N. S., 147; monograph, appended to *Jenkins v. Pennsylvania R. Co.* (N. J.), 2 R. R. R. 210, 25 Am. & Eng. R. Cas., N. S., 210 (smoke, noise and vibration as elements of injury to property from the operation of railroads).

alleged to have been damaged by the operation of appellant's railroad adjoining said tract. The declaration averred that defendant constructed its railroad track south of said premises, and was maintaining and operating a railroad thereon, and charged that, in passing, the locomotive engines emitted, discharged, and threw out and stirred up great volumes of smoke, cinders, ashes, and dust, and cast the same over, upon, and into said premises, and that the trains caused loud and ominous noises, and made the ground tremble, vibrate, and shake, causing the school in said premises to be disturbed and frequently to suspend. The plea was the general issue, and upon a trial there was a verdict for the plaintiffs for \$2,500. Defendant moved for a new trial, whereupon plaintiffs remitted \$700 from the verdict, and the court overruled the motion and entered judgment for \$1,800. The Appellate Court for the Fourth District affirmed the judgment.

The railroad was constructed and operated on defendant's own premises adjoining the schoolhouse grounds, no part of which was taken for the use of the railroad, and there was no interference with any right of access or easement appurtenant to the land or constituting a part or parcel of it. The railroad was built in a natural depression, upon an embankment about 25 feet high, bringing the track about on a level with the first floor of the schoolhouse. There was some difference in the hours of the different grades, but the school hours, including all of them, were from about 9 o'clock to 12, and from about 1 o'clock to 4. During that time six or eight trains passed the premises. There was a single track with no switches, and the grade was 46 feet to the mile. The trains going downgrade caused little or no inconvenience to the school or premises, but it was claimed that damages were caused by trains going upgrade, and especially the freight trains. The railroad track was variously stated to be from 188 to 221 feet from the schoolhouse. There was no substantial or direct evidence that cinders, ashes, or dust were ever thrown on the premises from engines of the defendant. The school-teachers were examined as witnesses by the plaintiffs, and one of them, being asked whether cinders were cast upon the schoolhouse, replied that she did not know; that they had considerable cinders anyhow from the stoves in the schoolhouse. Another teacher, when asked if the trains emitted smoke or cinders, answered, "Oh, the trouble is not that so much," but she said there was some smoke. There were other witnesses who were residents of Murphysboro, and one of them thought there would be some dust, and another that there would be smoke and cinders, but he said that he never saw any cinders, or knew that any were ever dropped on the property. Another said that he thought there would be a certain amount of soot in the air that would fall on the schoolhouse,

but no witness testified that any dust or cinders or soot was ever cast upon the premises. There was some testimony that a jarring or vibration could be felt at the schoolhouse when heavy freight trains went up the grade; but whether it was atmospheric, or whatever its nature, there was no evidence whatever of any damage from that source. There was no evidence that the building or the walls were affected in any manner whatever, or that the building, which was about 12 rods from the railroad, was not as secure, safe, and sound as it ever was. Wrong and damage must concur, and there must be injury or damage, to justify a verdict on account of vibration. There was no evidence tending to prove any damage from that source, and in that respect the case is different from *Chicago North Shore Street Railway Co. v. Payne*, 192 Ill. 239, 61 N. E. 467, where the ceilings and walls of the dwelling house were cracked and pieces of the plastering fell off. With reference to smoke, the evidence was that occasionally, when the wind came from the direction of the railroad, the smoke would enter the rooms on the south side, facing the track, if the windows were open. Two of the teachers testified that they were not disturbed much by the smoke. The school year commenced in September, and ended the latter part of April. During most of that time the windows were closed, and there was no annoyance from smoke when they were closed. The evidence was that there was some slight annoyance from the smoke, but the principal damage, in the opinion of all the witnesses, was the noise made by the trains, which interfered with recitations in the school. The railroad consisted of a single track, and there was no switching or making up of trains opposite the premises. The evidence of the teachers was that, when a train passed, the children would turn to look at it or rise out of their seats, and in the case of heavy trains the noise would sometimes be so great as to compel a stoppage of recitations for a minute or two at a time. There were four passenger trains and two freight trains, together with an occasional extra freight and two trips of the yard engine, daily, during the school hours.

After examining the witnesses as to the effect on the premises of the operation of trains, none of whom testified as to value or damages, plaintiffs produced a number of witnesses, and asked them, on direct examination, to what extent the value of the schoolhouse premises was depreciated by the building and operation of defendant's railroad. These witnesses gave no specific reasons for fixing the damages, but testified that the school property before the railroad was built was worth \$7,000 or \$8,000, and some of them estimated the damages from \$2,000 to \$5,000, while others said they were damaged from one-third to 50 per cent. of the value. On cross-examination these witnesses were inquired of as to the injuries which formed the basis of their testi-

mony as to damages. One estimate common to all of them was the noise made by the trains, which interfered with the school; and one said that the people were not getting the value of what they paid to the school-teachers because the work was interfered with. One estimate of damage included was attracting the attention of the school children during school hours and looking at the trains go by. Other witnesses had made the damage from the embankment obstructing the view a part of their estimate, and others the possibility of children getting on the track and being run over. They had all included in their estimates damages for which it is conceded there could be no recovery, and each of them testified that he was unable to state the amount of damages excluding those things for which there could be no recovery, such as attracting the attention of the school children, obstruction of the view, or the possibility of children being injured. It was made clear on the cross-examination that there was no testimony of those witnesses as to the amount of damages occasioned by smoke, cinders, dust, or other things for which damages could be recovered.

The court denied the motion, and allowed the testimony as to the amount of damages, ranging from \$2,000 to \$5,000, or from one-third to one-half the value of the property, to remain before the jury. In this the court erred. *City of Chicago v. Spoor*, 190 Ill. 340, 60 N. E. 540.

There are certain injuries to property for which the owner may recover damages although no part of the property itself is actually taken for the public use. While there is but little difficulty in laying down general rules concerning the nature of such injuries, there is sometimes much difficulty in applying them to particular cases and drawing a definite line between injuries for which the law allows a recovery and those for which it affords no remedy. The provision of the Constitution that private property shall not be damaged for public use was not intended to reach every possible injury that may be occasioned by a public improvement. There are certain injuries incident to ownership of property in towns or cities, which directly impair its value, for which the law does not afford, and never has afforded, any relief. *Rigney v. City of Chicago*, 102 Ill. 64. Those injuries are compensated for by the conveniences and advantages of civilization, and both injuries and benefits are common and public. Under the Constitution of 1848, which only allowed compensation for property taken for the public use, there were certain direct physical injuries to property, none of which was actually taken, which were held to be within the Constitution. Obstructing the natural flow of water, and turning it in increased quantity upon the lands of an individual, is an example (*Nevins v. City of Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *City of Aurora v. Gillett*, 56 Ill. 132; *City of Aurora v. Reed*, 57 Ill. 29, 11 Am. Rep. 1; *Toledo, Wabash & Western*

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Railway Co. v. Morrison, 71 Ill. 616); also discharging dirty water, offal, and filth upon premises (*City of Jacksonville v. Lambert*, 62 Ill. 519); also casting smoke and cinders, or dirt and dust, upon premises (*Stone v. Fairbury*, *Pontiac & Northwestern Railroad Co.*, 68 Ill. 394, 18 Am. Rep. 556; *Stack v. City of East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619). The same rule has, of course, been applied under the present Constitution, and a direct physical disturbance of property by casting cinders, smoke, and dust upon it has been considered a taking. *Chicago, Milwaukee & St. Paul Railway Co. v. Darke*, 148 Ill. 226, 35 N. E. 750; *Chicago North Shore Street Railway Co. v. Payne supra*.

The present Constitution requires compensation for property taken or damaged for public use, and the question what additional class of injuries it was intended to provide for was first fully considered in *Rigney v. City of Chicago, supra*. That was a case of the obstruction of a public street, interfering with the access to property. It was decided that damages from such an injury were guarantied by the Constitution. It was held that if an obstruction did not practically affect the enjoyment or use of neighboring property, and thereby impair its value, no action would lie, but that, if the owner sustained a special damage with respect to his property from such a cause in excess of that sustained by the public generally, the Constitution required compensation. This rule was then laid down (page 80, 102 Ill.): "In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present Constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law."

The important question is to determine what is a special damage and injury, within the meaning of that and other cases. One thing that is clear is that the damage must be a damage to property, and not a mere personal inconvenience or injury, such as a damage to trade or business. *Hohmann v. City of Chicago*, 140 Ill. 226, 29 N. E. 671. If a right of action is merely personal, without reference to property, the Constitution does not guaranty compensation. If the injury amounts only to an inconvenience or discomfort to the occupants of property which would authorize a personal action, but not affecting the value of the property, it is not within the provision. The injury must also be actual, sus-

ceptible of proof, and capable of being approximately measured. It must not be merely speculative, remote, prospective, or contingent. The special damage must be different in kind from that sustained by the general public, although it does not cease to be special because a considerable number are affected in the same way. *City of Chicago v. Union Building Ass'n*, 102 Ill. 379, 40 Am. Rep. 598. The general public does not mean the people of the state at large, or of some other town or city who are not affected at all by the improvement, but it means the people of the whole neighborhood, and, if the damages differ only in degree from those suffered in common by such public, the injury is not within the provisions of the Constitution. It is a matter of common knowledge that, where bituminous coal is used by individuals, manufacturing establishments, and railroads, the atmosphere is filled with smoke, and more or less soot is deposited over the whole neighborhood or city. In populous communities no one escapes injury and annoyance from other causes, such as the dust raised in dry weather by teams, and the noise of travel over stone pavements, and perhaps with loads which add greatly to the noise. Such things are inconveniences, but they are common to everybody and special to none. They affect every one who comes within their range, without regard to ownership of property. If it were not required that damages should be special to property, there would be no stopping place in litigation, and the number of infinitesimal injuries for which action could be brought would be unlimited.

The provision of the Constitution must have a reasonable and practical interpretation, and cannot be extended to require compensation to every person in the community who can hear the noise of a train or be interrupted to some extent by it. Accordingly, it was held in *Aldrich v. Metropolitan West Side Elevated Railroad Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237, that there could be no recovery for the usual noise and vibration attendant upon the operation of the railroad. In that case the declaration, in some of its counts, stated a good cause of action, charging obstruction of access to the premises, vibration and consequent damage to the property, but the evidence showed that there had been no direct physical disturbance of any right, public or private, which the plaintiff enjoyed in connection with her property. The road was not constructed in the street along plaintiff's property, injuring or destroying any right which she enjoyed in connection with it, and her damages were of the same kind as those sustained by the general public. The distinction between that case and the cases of *Chicago, Milwaukee & St. Paul Railway Co. v. Darke*, *supra*, and *Chicago, Peoria & St. Louis Railway Co. v. Leah*, 152 Ill. 249, 38 N. E. 556, was there pointed out. In the first of those cases, cinders, ashes, and smoke were thrown and blown directly

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on the plaintiff's premises in considerable amount, and there was a direct physical injury to the property. In the other case the plaintiff was the owner of a piece of land fronting on a narrow street, 20 feet wide, which the railroad crossed diagonally opposite plaintiff's premises, from which it was distant at the nearest point $6\frac{1}{2}$ feet. The street afforded the only approach to the premises, and there was a switch near by, and in both cases the premises were occupied for dwellings.

It is said by counsel for appellees that this case is the same as *Illinois Central Railroad Co. v. Turner*, 194 Ill. 575, 62 N. E. 798. We think the distinction is quite clear. In that case the railroad was built in a street within a few feet of the plaintiff's property, on a sharp curve and considerable grade, and the passing engines and trains threw large quantities of smoke, dust, and cinders upon the property, and caused the building to vibrate and shake, resulting in great damage to it. Counsel also say that they are unable to distinguish between this case and the case of *Calumet & Chicago Canal & Dock Co. v. Morawetz*, 195 Ill. 398, 63 N. E. 165. In that case a railroad was constructed and operated in front of plaintiff's premises in a public street. There was a house on the property, occupied as a store and residence for families. There was a track and several switches at the corner and west of the house near the side door, where the tracks were within a few feet of the building. The passing trains threw smoke, soot, and cinders directly into the house. Both cases come directly within the rules already stated.

If a part of a tract of land is taken for public use, compensation is to be made equal to the market value of the property so taken, and, in considering the question of damages to the residue of the land not taken, all benefits and injuries which are real, and not merely speculative or imaginary, are to be taken into account and balanced against each other. The damages must be real, and not imaginary or speculative. *Chicago & Pacific Railroad Co. v. Francis*, 70 Ill. 238. But the nature of the use to which the property is applied, so far as it affects the remainder, must be considered. There would be an entirely different effect upon the residue where the land is taken for a public park, or similar use, than if taken for a noisy and offensive use—at least, if the premises were occupied for a residence. Noise, smoke, and dust might make very little difference in the value of a foundry or machine shop, while a residence within a few feet of a railroad track might be greatly damaged. The same rule has been substantially applied where access to property by way of a public street has been interfered with by building a railroad in the street. The right obstructed and interfered with in such a case is appurtenant to the land, and the nature of the obstruction and use is a proper subject of inquiry as affecting the measure of damages. In such a case it

is a natural inquiry what the nature of the obstruction is, and what effect it and its use will have upon the property. Although the construction of a road is authorized by law, the corporation is not protected in the negligent and improper construction, nor is it exempt from liability for injuries for which an action would lie at common law against an individual. *Rigney v. City of Chicago*, supra.

The court, in instructing the jury, told them they could not allow any damages for cutting off the view, or danger to school children from getting on the track, but that the plaintiffs might recover for the casting of smoke, cinders, and ashes on the premises, the vibration of the ground caused by passing trains, and loud and ominous noises disturbing the school. It is clear that these instructions did not cure the error of denying the motion to strike out the evidence which included improper elements of damage. The amount of the verdict conclusively demonstrates that fact. The \$2,500 damages allowed by the jury, and the judgment of \$1,800 entered after the remittitur, have no foundation in the legitimate evidence of damages for which an action could be maintained. The instruction authorizing a recovery for the vibration of the ground caused by passing trains was wrong for want of any evidence that the property was damaged in any manner thereby; and if the evidence would warrant an inference that there was any direct physical injury from smoke, cinders, or dust, and that the smoke and noise were special injuries to the property as herein explained, the jury could not have returned the verdict, or the court entered the judgment, without considering and including the improper elements testified to by the witnesses. The building was about 200 feet from the track, and was not used for a residence, but was devoted to school purposes during certain hours from September to April, inclusive. Neither the verdict nor judgment can be accounted for without including the improper testimony as to damages which the court refused to strike out, and the error was not cured by the instructions. For the errors indicated, the judgments of the Appellate Court and the circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

McDONALD v. NEW YORK CENT. & H. R. R. CO.

(Supreme Judicial Court of Massachusetts, Berkshire, Oct. 17, 1904.)

[72 N. E. Rep. 55.]

Accident at Crossing—Failure to Signal—Evidence.*

In an action against a railroad company for killing plaintiff's intestate at a crossing, in which the negligence charged was a failure to give the required signals, positive testimony of two witnesses, who were near, that the signals were not given, and testimony of other persons similarly situated that they did not hear the signals, required submission of the question to the jury.

Same—Same—Same.

Failure of persons near to notice or hear the signals was competent for the consideration of the jury.

Same—Same—Negligence—Gross Contributory Negligence—Burden of Proof—Statute.†

If in an action against a railroad company for death based on its failure to signal approach at a crossing as required by Rev. Laws, c. 111, § 268, defendant relies on the gross negligence of the person killed, it has the burden of proving such negligence, and plaintiff makes out a case by showing that the signals were not given, and that his decedent was killed by the train at the crossing.

Same—Contributory Negligence—Direction of Verdict.

If the only reasonable conclusion to be drawn from the evidence is that the person killed was guilty of such negligence, or was engaged in committing an unlawful act, the court should order a verdict for the defendant.

Same—Signals—Witnesses—Impeachment—Evidence—Inconsistent Statement.

A companion of a boy killed on a railroad crossing testified in an action for the death that he and deceased did not hear the train as they ran down the street, and that on his arrival home he told his parents of the event, and told them the truth. They testified that he told them that he and deceased heard the train, and deceased said, 'Let's run down and see the train go by:' *held*, that an instruction that the evidence was competent only to show that at some other time the boy had made statements inconsistent with his statement as a witness, and not to show that the statement made to his father and mother was a true statement, was correct.

Same—Gross Contributory Negligence—Question for Jury.

Deceased, a boy of 7½ years of age, left school with a companion, and ran along a road where they were accustomed to seeing a train pass, and deceased was struck and killed by the train; but no one saw how the accident occurred, and there was no direct evidence that he failed to look or listen: *held*, that it could not be said that there was no possible reasonable explanation save willful or gross negligence, and defendant was not entitled to a directed verdict, but the question was for the jury.

*Comparative weight of affirmative and negative testimony as to whether or not crossing signals were given, see foot-note appended to *St. Louis & S. F. R. Co. v. Brock* (Kan.), 12 R. R. R. 613, 35 Am. & Eng. R. Cas., N. S., 613; foot-note appended to *Chicago, etc., Ry. Co. v. Andrews* (C. C. A.), 12 R. R. R. 584, 35 Am. & Eng. R. Cas., N. S., 584.

†As to the presumption of due care on the part of a person killed by a train, see foot-note appended to *Bain v. Northern Pac. Ry. Co.* (Wis.), 12 R. R. R. 31, 35 Am. & Eng. R. Cas., N. S., 31.

As to whether it is negligence per se to fail to give crossing signals, see foot-note appended to *Butts v. Atlantic & N. C. R. Co.* (N. Car.), 8 R. R. R. 710, 31 Am. & Eng. R. Cas., N. S., 710.

McDonald v. New York Cent. & H. R. R. Co

Exceptions from Superior Court, Berkshire County;
Wm. B. Stevens, Judge.

Action by one McDonald, administrator, against the New York Central & Hudson River Railroad Company. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

Thos. F. Cassidy and P. J. Ashe, for plaintiff.
Crosby & Noxon, for defendant.

BARKER, J. The defendant's train struck and killed the plaintiff's intestate, a school boy of 7 years of age at a grade crossing, as the boy was going home from school about 4 o'clock of a winter afternoon. The action was in tort to recover for his death. At the trial the verdict turned upon the points whether the whistle was blown and the bell rung as required by the statutory provisions now embodied in Rev. Laws, c. III, § 188, and, if not, whether the failure to give the signals contributed to the accident, and whether, if the signals were not given, the boy was guilty of gross negligence.

1. The first question argued upon the plaintiff's brief is whether there was evidence to justify a finding that the statutory signals were not given. Fourteen or more witnesses testified on the point. Some of them, including the engineer and fireman of the train, testified positively that the whistle was blown and the bell rung. Many others testified either that they did not notice or did not remember. Two witnesses testified positively that the whistle was not blown nor the bell rung. Some of the witnesses who testified that they did not notice the signals or did not remember were in position where, if the signals had been given, the witnesses might be expected to notice them and to recall the fact. In this state of the evidence the question whether there was a failure to sound the whistle and ring the bell as required by the statute was for the jury. It was not the case of a single person who testified that he did not remember, as in *Tully v. Fitchburg Railroad*, 134 Mass. 499; or simply of several persons who testified either that they did not notice or did not hear, as in *Hubbard v. Boston & Albany Railroad Co.*, 159 Mass. 320, 323, 34 N. E. 459. At least two witnesses who were so placed that they might have heard the signals if given took the responsibility of testifying that the signals were not given. See *Johanson v. Boston & Maine Railroad*, 153 Mass. 57, 59, 26 N. E. 426; *Lamoureux v. New York, New Haven & Hartford Railroad Co.*, 169 Mass. 338, 47 N. E. 1009; *Walsh v. Boston & Maine Railroad*, 171 Mass. 52, 57, 50 N. E. 453. Others of the witnesses were in such positions that, if the signals had been given, the witnesses easily might have heard. *Menard v. Boston & Maine Railroad*, 150 Mass. 386, 23 N. E. 214. Their failure to hear or notice

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a signal was competent for the consideration of the jury. *Daniels v. New York, New Haven & Hartford Railroad Co.*, 183 Mass. 393, 396, 67 N. E. 424, 62 L. R. A. 751.

2. The bill of exceptions raises a question of evidence which it is well to consider before dealing with the other exceptions. The only count on which the case went to the jury was the one alleging the failure to give the statutory signals, and was founded on the provisions now embodied in Rev. Laws, c. 111, § 268. It is settled that, if the gross or willful negligence of the persons killed is relied on as a defense to such a count the burden of proving such negligence is upon the defendant. *Copley v. New Haven & Northampton Co.*, 136 Mass. 6; *Walsh v. Boston & Maine Railroad*, 171 Mass. 52, 57, 50 N. E. 453. If the only reasonable conclusion to be drawn from the evidence is that the person killed was guilty of such negligence, or was engaged in committing an unlawful act, the court should order a verdict for the defendant. See *Emery v. Boston & Maine Railroad*, 173 Mass. 136, 139, 53 N. E. 278. It was not in dispute that the deceased came out of school shortly before the passing of the train, and started homeward over a highway leading first in a direction parallel with, and not far from, the railroad, and then turning and leading over the crossing. He was in company with another school boy of about his own age, whose route homeward was over the same crossing. When the deceased was struck by the train the two boys were within a few feet of each other. The boy who was in company with the deceased was a witness at the trial. The substance of his testimony was that the deceased and himself were together at first, and that on the part of the road which was parallel with the railroad the deceased ran ahead a little ways, and got past the witness, and kept in advance to the crossing; that the witness was on the crossing when he saw the train coming and turned and went back; that he stood six or seven feet from the cars when the train went by; that as the witness turned and went back he did not see the deceased, as he remembered, and that he did not remember that the deceased was ahead of or behind him as the witness came down toward the crossing, and that he did not remember that he saw the deceased again after the witness turned and went back; that he did not see the train strike the deceased; that while the train was passing the witness was looking down towards the depot "about a minute," and then turned around and saw the deceased lying down on the snow bank beside the track; that he at the time of the trial was seven years of age, and going on eight; that he and the deceased usually went home from the school together, and that it was a frequent thing for this train to pass as they were going home; that the witness did not remember whether the deceased said anything when he started to run; that they did not hear the train, and so did not run down, and that he

did not remember whether the deceased or himself said anything. He further testified that at his home on the same night he told his father and mother about the occurrence, and that he told his father and mother the truth about it that night. The father and mother were both called as witnesses, and their testimony tended to show that their son told them that he and the deceased left school together, and started for home; that when they got to Bowen's Hill (on the road parallel with the railroad) they heard the train whistle, and the deceased said, "Let's run down and see the train go by," and that they started on a run down the hill, and the deceased ran past him midway of the hill, and got down there before he did, and he did not pay any more attention to the deceased until he saw him lying in the snow. The jury were instructed that this testimony of the father and mother was not any affirmative evidence of what took place, and was competent only for the purpose of showing that some other time the boy had made statements inconsistent with his statement made upon the witness stand, and was not competent for the purpose of showing that the statement made to his father and mother was a true statement. The defendant excepted to this part of the charge, and now contends that the statement to the father and mother should be deemed evidence of the truth of the occurrence so stated. We are of opinion that the instruction was correct. The testimony of the boy that he told his father and mother the truth about the occurrence that night did not change the statements then made by him from hearsay. They were still declarations made without the sanction of an oath, and with no opportunity for cross-examination by parties in interest. In *Jack v. Woods*, 29 Pa. 375, and in *Rothrock v. Gallaher*, 91 Pa. 108, the declarations considered were testimony given under oath in court in former trials, and were offered because of failure of mind on the part of the witness. See *Day v. Cooley*, 118 Mass. 524; *Brooks v. Weeks*, 121 Mass. 433, 435; *Manning v. Carberry*, 172 Mass. 432, 52 N. E. 521; *Knight v. Overman Wheel Co.*, 174 Mass. 455, 466, 54 N. E. 890. See, also, *Commonwealth v. Piper*, 120 Mass. 185, 187, and cases cited.

3. The remaining contentions made upon the defendant's brief relate to the question whether, even if the statutory signals were not given, the plaintiff ought to have been allowed to go to the jury upon the evidence. The defendant requested a ruling that the evidence was insufficient to warrant a finding for the plaintiff, which was refused, and also a ruling that, if the deceased went upon the crossing without looking or listening for the train, and was struck, he was guilty of gross negligence. The latter request was not given in terms, but the jury were instructed that, if the plaintiff's intestate heard the whistle of the train, and ran or walked towards the crossing for the purpose of seeing the train go by, and got so near the train as to be struck he was guilty of

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gross negligence, and they were also instructed in these words: "If the plaintiff's intestate, before arriving at the crossing, heard or saw the defendant's train approaching, and went upon the crossing to see the train go by, and was struck by the defendant's train, he was guilty of gross negligence, and cannot recover. That is to say, suppose this boy, seeing the train, knew it was coming, hearing the whistle, or not hearing the whistle, went down for the purpose of seeing the train go by, under those circumstances you see the railroad could not be held responsible, because it could not be said in that case that the failure of the railroad to blow the whistle or ring the bell contributed toward that accident." If, the jury must have found, the required signals were not given, all that the plaintiff was required to prove further was that the deceased was killed at the crossing by the train. The plaintiff need not show that the deceased was careful. If the defendant relied upon the gross negligence of the deceased, that defense must be established by evidence. As the evidence stood, no person saw the deceased struck, or assumed to testify just how the accident happened. We think the question whether he was grossly negligent was for the jury. There was no direct evidence that he failed to look or listen for the train, and it cannot be said that upon the evidence there was no possible reasonable explanation of the accident save his gross or willful negligence.

Exceptions overruled.

DENISON & S. RY. CO. v. CARTER.

(Supreme Court of Texas, Nov. 7, 1904.)

[82 S. W. Rep. 782.]

Injury to Minor Riding by Permission of Motorman—Liability.*

A street railway company was liable for the motorman's negligence resulting in injuries to a minor whom the motorman permitted to ride on the car in consideration of certain services rendered, though the motorman had no authority to make such arrangement.

Same—Alighting from Moving Car—Proximate Cause.†

A street railway motorman permitted plaintiff and certain other boys to ride on the front platform of a street car in consideration, as plaintiff claimed, of certain services performed for the motorman. After they had ridden several blocks, the motorman, without stopping the car, directed them to get off, and plaintiff in so doing

*See note appended to *Burke v. Ellis* (Tenn.), 19 Am. & Eng. R. Cas., N. S., 695 (liability for injuries to children riding on cars by permission of employees); note appended to *Tully v. Philadelphia, W. & B. R. Co.* (Del.), 20 Am. & Eng. R. Cas., N. S., 323 (duty of railroad companies to infant trespassers); foot-note appended to *Louisville & N. R. Co. v. Logsdon* (Ky.), 12 R. R. 637, 35 Am. & Eng. R. Cas., N. S., 637 (care due trespassing children).

†As to what is, and is not, the proximate cause of an injury, see foot-note appended to *Haley v. St. Louis Transit Co.* (Mo.), 12 R. R. 142, 35 Am. & Eng. R. Cas., N. S., 142, where all preceding authorities in this series are collected.

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was injured: *held*, that the proximate cause of the injury was plaintiff's attempt to alight from the moving car, and not the act of the motorman in permitting him to ride on the front platform.

Same—Same—Riding in Dangerous Place—Actionable Negligence.

Where plaintiff, a minor, was injured while attempting to alight from the front platform of a moving street car, it was not actionable negligence on the part of the street car company to permit plaintiff to ride on the car, as distinguished from a place on the car which was especially dangerous.

Contributory Negligence—Alighting from Moving Car—Evidence—Penal Ordinance.

Where plaintiff, a minor, was injured while alighting from a street car, and he claimed that he got off on the demand of the motorman, who testified that plaintiff and others entered the car without his permission, and that, on his stating to them that they must ride inside the car or get off, plaintiff jumped from the car, and was injured, as it was slowing up, evidence of a city ordinance making it a misdemeanor for any person other than an employee or officer of the railroad company to jump from a street car while in motion was admissible on the issue of plaintiff's contributory negligence.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Louis E. Carter against the Denison & Sherman Railway Company. From a judgment in favor of plaintiff, affirmed by the Court of Civil Appeals (79 S. W. 320), defendant brings error. Reversed.

Head & Dillard, for plaintiff in error.

Wolfe, Hare & Maxey, for defendant in error.

WILLIAMS, J. This writ of error is prosecuted by the railway company from a judgment of the Court of Civil Appeals for the Fifth District affirming a judgment of the district court against the plaintiff in error in favor of Carter, suing by next friend, for damages for personal injuries caused by his being run over by one of the plaintiff in error's electric street cars in the city of Denison. At the time of the occurrence Carter was 10 years old, and the version of it given by him and his companions is that when the car, which was under the exclusive control of one Pratt, the motorman, reached one of the termini, where they were assembled, one of them asked Pratt if he would allow them to ride if they would turn the trolley for him, and, receiving his consent, one of them turned the trolley and all of them entered the car, plaintiff and his elder brother getting upon the front platform with the motorman, and their companions upon the rear platform; that, after they had ridden two or three blocks, the motorman, without stopping the car, but continually increasing its speed, said to them that they had ridden far enough, and directed them to get off; that, after the boys in the rear had gotten off, plaintiff's brother jumped from the front platform, and plaintiff, in attempting to follow, was thrown under the wheels of the car and injured. The motorman gave a different account of the transaction. He denied giving permission for the boys to ride, stating

that they turned the trolley without his consent, and entered the car of their own accord, he supposing they intended to pay fare and ride into town; that, as soon as he had given some information to and collected fare from another passenger, he turned his attention to the boys on the front end of the car, and said to them, "If you are going to ride, get inside; if not, you must get off;" that, seeing they paid no attention to what he said, he knew they did not intend to pay fare, and began to stop the car, noticing which, and before he could stop the car, plaintiff's brother jumped off, and plaintiff followed, and was hurt, the car at the time moving slowly and slowing up.

The petition asserted negligence on the part of the defendant (1) in permitting him to get upon the car, and (2) in requiring him to leave it while in motion; alleging that on account of his youth and lack of experience and discretion he was incapable of understanding the dangers he incurred in riding on the car, and in attempting to alight from it under the circumstances shown. The charge submitted both of these contentions, instructing as to the first as follows: "If you believe from the evidence that said Henry Pratt permitted plaintiff to get on and ride on the front platform of said car; and if you further believe from the evidence that plaintiff was a youth of such immature judgment and discretion that he did not understand the danger, if any, to which he would be exposed in alighting from the front platform of said car while the same was in motion, under the circumstances which you find from the evidence existed at the time he did alight from said car; and if you further believe from the evidence that the front platform of said car was a dangerous place for plaintiff to ride by reason of his immature judgment and discretion and consequent lack of understanding the danger, if any, attendant upon his alighting from said car while the same was in motion, under the circumstances then existing (if you find that he was at that time of such immature judgment and discretion); and if you further believe from the evidence that said Henry Pratt was guilty of negligence, as this term will be defined to you, in permitting plaintiff to ride on the front platform of said car (if you find that said Pratt did so permit plaintiff to ride thereon), and that said negligence, if any, of said Pratt, was the direct and proximate cause of plaintiff's injuries—then you will find for the plaintiff, unless you find for the defendant under the other instructions given you." Two objections to this instruction were urged in the Court of Civil Appeals, and to them we confine our attention, viz.: (1) "Negligence of the motorman or driver of the street car in permitting a child to ride upon such car when such permission is granted to subserve the purpose of the driver individually, and not in transacting the business of the owner of the car, does not render such owner liable for the injuries to the child in

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getting on or off the car." (2) "The evidence in this case did not raise the issue as to plaintiff having been injured by reason of his being permitted to ride at a dangerous place on the car, but only raised the issue as to his having been injured by his being caused by the motorman to leave the car while it was in motion."

1. It may be conceded that the agreement the motorman is alleged to have made was beyond the scope of his authority, and did not create any obligation on the part of the company to carry the boys, but it is still true that he was acting within such authority in managing and moving the car, and that for any negligence on his part in doing that his master would be responsible. With his exclusive control of the car he necessarily had power to admit to or exclude from it persons desiring to ride on it; and to those actually on the car by his permission, whether given for one reason or another, the master, in operating it through him, might owe duties for the disregard of which it would be liable. His agreement, considered by itself, may have been his act alone, but his management of the car was, in law, his master's management, because that was the business intrusted to him. Many authorities sustain the proposition that servants controlling such cars, when receiving and carrying young children, whether with or without consideration, act within the scope of their employment, and incur the obligation of performing certain duties for the protection of the children which is ascribed to the master. *Cook v. Houston Direct Nav. Co.*, 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52; *Brennan v. Railway*, 45 Conn. 284, 29 Am. Rep. 679; *Wilton v. R. R. Co.*, 107 Mass. 108, 9 Am. Rep. 11; *Pittsburg, etc., Ry. Co. v. Cardwell*, 74 Pa. 421; *Railway Co. v. Bohn*, 27 Mich. 503; *Richmond, etc., Ry. Co. v. Wilkinson*, 101 Va. 394, 7 R. R. R. 723, 30 Am. & Eng. R. Cas., N. S., 723, 43 S. E. 622; *Metropolitan Ry. Co. v. Moore*, 83 Ga. 453, 10 S. E. 730; *Chicago, etc., Ry. v. West*, 125 Ill. 320, 17 N. E. 788, 8 Am. St. Rep. 380; *Sandford v. Hestonville Ry. Co.*, 136 Pa. 84, 20 Atl. 799. The liability of the master in such cases does not arise from the mere fact of ownership of the instrument or appliance with which the injury is inflicted, but from the servant's negligence in doing the master's business with such instrument or appliance, which distinguishes those decisions of this court so much relied on by counsel for plaintiff in error as conflicting with the decision in this case. *Branch v. Railway*, 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844; *Dawkins v. Railway*, 77 Tex. 232, 13 S. W. 984; *Railway v. Cooper*, 88 Tex. 607, 32 S. W. 517. In these cases the servants, in inflicting the injury, were doing nothing in furtherance of the master's business, but were employing the master's property for purposes wholly their own. The case of *Railway v. Black*, 87 Tex. 160, 27 S. W. 118, involves a different principle.

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A brakeman committed an assault in ejecting the plaintiff from a freight train, and, as it was not shown that it was within the line of his duties to expel trespassers, the court held, as it did in the *Anderson Case*, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902, that the company was not responsible, unless between it and the plaintiff there existed the relation of carrier and passenger, imposing on it the duty of protection; and it was further held that such relation did not exist, because the company did not undertake or authorize its servants to carry passengers upon its freight trains. Here the purpose for which this car was intrusted by the company to the motorman was the carrying of people, and the performance of his duties, as we have said, involved the admission and exclusion of persons from the car. Hence, in receiving and carrying these children upon such a car, if he did so, he was not going beyond the scope of his master's business, as were the servants in the *Black Case* in receiving the plaintiff upon a freight train; nor was he, as were the servants in the other cases relied on, using the property of the master for his own purposes. The fallacy of this contention lies in the assumption that, because the servant permitted the boys to ride for an improper reason, in running the car he was not acting for the master. If, in the control and management of the car, he was guilty of negligence which caused the injury to the plaintiff, the company is responsible.

2. The objection made to the charge in the second proposition must be sustained, for the reason that the act of the motorman in permitting plaintiff to ride on the front platform of the car cannot, in this case, be regarded as a proximate cause of the injury. The authorities first cited warrant the proposition that there might be actionable negligence in permitting an immature child, incapable of caring for its own safety, to ride in such a position, when it has received an injury proximately resulting from that fact—as when it has fallen from the platform, or has been led by its childish impulses to jump therefrom. It is held that it may be negligence in those managing a car to allow such a child to incur the risks incident to riding in so exposed a position, and also in not exercising a careful watch and restraint over it while so riding. We make no question as to the soundness of these doctrines when applied to some states of fact, but we do not see their application here. No injury resulted to the plaintiff from riding on the platform. He was hurt in jumping off, and under the facts peculiar to this case its decision turns upon the question as to the negligence vel non of the motorman in causing or permitting him to do that. He did not fall from the platform nor jump off because the motorman lost sight of him, but claims that he was caused to jump by the motorman. His own act in jumping was the proximate cause of his injury, and the question is solely as to the legal

responsibility for that act—whether it is his, or should be imputed to the company because of negligence on the part of the motorman in causing or permitting it; and that is the question that should be submitted with proper instructions to enable the jury to determine it.

It is to be observed that the petition claims that there was negligence in admitting the plaintiff to the car at all, and not that he was permitted to ride upon the front platform as an especially dangerous place. This complaint seems to be based upon the doctrine of the "turntable cases" and others in which liability was fixed upon the owners of dangerous machinery because of enticements or invitations held out to children to expose themselves to the dangers incurred in being in or about such places. It seems to us that doctrine is inapplicable to the mere act of allowing children to get upon cars fitted up and used for the conveyance of all classes of persons, old and young, experienced and inexperienced; and that actionable negligence must consist in something more—such as want of proper care in guarding the safety of those entering such vehicles, in getting on or off, or in traveling on them. *Railway v. Bohn*, supra; *Barney v. Railway* (Mo. Sup.) 28 S. W. 1069, 26 L. R. A. 847. Of other rulings of the court in giving and refusing instructions plaintiff in error has no just cause to complain.

The plaintiff in error complains of the exclusion of the following ordinance, in force in the city of Denison: "Any person, not being a regular employee or officer of the railway company who shall, within this city, jump on or off, cling to or hang on any street railway car while the same is in motion, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two dollars nor more than one hundred dollars." We think the ordinance should have been admitted. The objection that there was no evidence or offer of evidence that plaintiff "had discretion sufficient to understand the nature and illegality of the act constituting the offense" (Pen. Code 1895, art. 34) was not urged in the trial court, the objections made and sustained being of such a nature that an offer of further evidence on the subject would have been futile. Besides, the plaintiff testified before the jury concerning the transaction on which he based his right to recover, and whether or not he had the requisite degree of intelligence was a question for the jury, and not for the court. The ruling of the court was that the ordinance was inapplicable to the facts of this case. But the facts were in dispute, and the jury might have found that plaintiff got on and off the car without the consent of the motorman and as a trespasser. If this were true, the ordinance might not be necessary to the protection of the defendant, but it was still, we think, entitled to have it admitted in evidence, and its effect explained to the jury. We are further of the opinion

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that a plaintiff complaining of an injury caused or contributed to by his violation of a valid ordinance of this character should not be allowed to recover. The trial court doubtless based its ruling upon the decision of this court in the case of *Mills v. Railway*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497, but that decisions would be applicable only in case the jury should find that plaintiff got on and off the car with permission of the motorman, and in the exercise of a right. In that case there was not, as there is in this, evidence tending to show that the conduct of the plaintiff was a trespass pure and simple. That a valid ordinance may impose a duty the violation of which proximately contributing to an injury to another constitutes negligence, has often been declared by the courts of this and other states (see cases cited in 21 Am. & Eng. Ency. Law, 478, 479), and it necessarily follows that such a violation may also preclude a plaintiff from recovering where it has contributed proximately to the injury of which he complains (*Ry. v. Cocke*, 64 Tex. 157). It is not the mere fact that, when injured, he was violating law, but the fact that his violation led to his injury, that defeats him. Under the charges given the jury must have determined, without considering the ordinance, that plaintiff was too young and immature to understand and protect himself against the danger of jumping from the moving car, but they might have found differently as to his ability to comprehend the illegality of an act coming within the terms of the ordinance had it been admitted and evidence heard upon the subject. At any rate, it should have been admitted, and the jury should have been instructed as to its bearing upon the case.

Reversed and remanded.

MOORE v. CHARLOTTE ELECTRIC RY., LIGHT & POWER CO.

(Supreme Court of North Carolina, Nov. 22, 1904.)

[48 S. E. Rep. 822.]

Killing Dog—Presumption of Negligence—Application of Statute.

A dog is not within Code, § 2326, making the killing of any cattle or other live stock by its engines or cars prima facie evidence of negligence on the part of the railroad company.

Same—Right of Action.

A dog is a species of property for an injury to which an action at law may be sustained.

Dogs on Track—Care Required—Presumption That Animal Will Avoid Train.

A dog, in respect to the care which locomotive engineers owe to them and their owners, is on the same footing with that of a man walking on or near a railroad track, and the engineer is warranted in acting on the belief that the dog will get out of the way, where the dog is apparently in the possession of his faculties.

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Same—Same.*

A street railway company, when its cars are properly equipped, is not liable in damages for the killing of a dog by one of its cars, unless the killing was done under such circumstances as to justify the conclusion that it was either willful, wanton, or reckless.

Same—Evidence—Fenders.

In an action against a street railway company for damages for the killing of plaintiff's dog, which was run over by a car, it was error to permit plaintiff to testify that he had measured the fenders on one of defendant's cars, and found it 25 inches from the track, and that he saw several fenders that were about the same height.

Same—Same—Same.

In an action against a street railway company for damages for the killing of plaintiff's dog, which was run over by a car, it was error to receive the testimony of plaintiff that there were several different kinds of fenders on the cars, and that those on the big cars were different from those on the little ones, and that a little car killed the dog.

Appeal from Superior Court, Mecklenburg County; McNeill, Judge.

Action by W. J. Moore against the Charlotte Electric Railway, Light & Power Company. From a judgment in favor of plaintiff, defendant appeal. Reversed.

Burwell & Cansler, for appellant.

T. G. McMichael, for appellee.

MONTGOMERY, J. This action was commenced in a court of a justice to the peace for the recovery of \$50 for the killing of the plaintiff's dog by the alleged negligent operation by the defendant of one of its street cars. There were no written pleadings in the case, but upon a reading of the evidence it would appear that the plaintiff on a trial in the superior court relied upon four alleged acts of negligence: First, excessive speed of the car; second, permitting high weeds to grow upon the sides of and near the track; third, the failure to stop the car in time to avoid the collision; and, fourth, failure to equip the car with a proper fender.

We have no case in our Reports where the injury to or the killing of a dog by a railroad or street car company is made the subject of a civil action for the recovery of damages by its owner. Our statute (section 2326 of the Code) makes it prima facie evidence of negligence on the part of a railroad company in an action for damages against the company, when ever it appears that any cattle or other live stock shall be killed by the engines or cars running upon the railroad. The statute does not give the right, in case of injury or killing of cattle or other live stock, to the owner thereof to bring an

*As to the liability of railroad companies for running over dogs on their tracks, see foot-note appended to *Strong v. Georgia Ry. & Electric Co.* (Ga.), 9 R. R. R. 474, 32 Am. & Eng. R. Cas., N. S., 474; *Kansas City, M. & B. R. Co. v. Hawkins* (Miss.), 8 R. R. R. 480, 31 Am. & Eng. R. Cas., N. S., 480 (carelessness amounting to design in failing to see dog on track, and in failing to signal).

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action for his loss of property. That right the owner had before. The statute made the killing *prima facie* evidence of negligence. The dog is not included, of course, in the category of cattle or live stock, but is a species or subject of property recognized as such by the law, and for an injury to which an action at law may be sustained. *State v. Latham*, 35 N. C. 33. There would be no presumption of negligence, however, by the mere fact of killing or injury being shown. In numerous cases this court has laid down the law concerning the duties of engineers in charge of moving railroad locomotives in regard to cattle and live stock on and in near proximity to the railroad track and in front of the moving cars. In *Wilson v. Railroad*, 90 N. C. 69, the court said: "If the mule ran off the road quietly, and manifested by its acts no great alarm, but a disposition to get away from the road, or if at first it stood still, off the road, until the near approach of the train, then it suddenly ran back on the road a short distance ahead of the engine and was killed, the engineer being unable to stop the train, in such case there would not be negligence, and the defendant would not be liable. But, in another view, if the mule was greatly frightened at the whistle and the train—was panic stricken, ran about wildly and recklessly in the immediate neighborhood of the road—and would as likely, in its fright, run on as from it, and the engineer failed to slacken the speed of the train, and the mule suddenly dashed back on the road and was killed by the engine, this would be negligence, and the defendant would be liable for damages. It may be conceded that where cattle are quietly grazing, resting, or moving near the road—not on it—and manifesting no disposition to go on it, the speed of the train need not be checked; but the rule is different where the cow or mule is on the road, and runs on, then off, along, near to, and back upon it. In such a case reasonable diligence and care require that the engineer shall slacken the speed, keep the engine steadily and firmly under his control, and, if need be, stop it until the danger shall be out of the way." That case is cited and approved by this court in *Snowden v. Railroad*, 95 N. C. 93, and *Ward v. Railroad*, 109 N. C. 358, 13 S. E. 926. And in *Doster v. Street Railway*, 117 N. C. 651, 23 S. E. 449, 34 L. R. A. 481, the court said: "Where a horse is being driven or is running uncontrolled along a highway parallel to a railway of any kind, though it give unmistakable evidence by its movements that it is alarmed at an approaching train or car, the engineer or motorman in charge is not negligent in failing to diminish the speed unless the animal is actually on the track in his front, or he has reasonable ground to believe that in its excited state it is about to go or may go upon it, so as to cause a collision." We think that the dog is not entitled to the same consideration at the hands of an engineer in charge of a moving locomotive that cattle or live stock are, and that

the engineer is not, therefore, compelled to keep either a vigilant lookout for dogs, or as great care in the management of his engine or train, so as to prevent their injury, as he is for cattle or live stock. However, the dog in the case before us suddenly appeared on or near the track, and manifested no fear or excitement. It is not hazarding too much to say that it is a matter of common knowledge that in the classification of animal life (not including man) the dog occupies a position in point of intelligence, fidelity, and affection superior, probably, to all of the others. He is known to have been for ages not only an animal of prey, but wonderfully acquainted with the habits and ways of both man and beast and birds, keenly sensitive as to sight, hearing, and smell, and remarkably agile in all of this movements. He can, by training and association with man, become adept in many useful employments, and can be taught to do almost anything except to speak. They are known ordinarily to be able to take care of themselves amidst the dangers incident to their surroundings. Where a horse, or a cow, or hog, or any of the lower animals would be killed or injured by dangerous agencies, the dog would extricate himself with safety. In a line with the foregoing observations is one in the opinion in the case of *Jones v. Bond* (C. C.) 40 Fed. 281, where the court, in denying the right of recovery for the negligent killing of a dog, said: "I presume the reason that other cases of like kind have not been before the courts is that the dog is very sagacious and watchful against hazards, and possesses greater ability to avert injury than almost any other animal; in other words, takes better care of himself against impending dangers than any other. He can mount an embankment or escape from dangerous places where a horse or cow would be altogether helpless; hence the same care to avoid injuries to an intelligent dog on a railroad is not required of those operating the trains that is required in regard to other animals. The presumption is that such dog has the instinct and ability to get out of the way of danger, and will do so, unless its freedom of action is interfered with by other circumstances at the time and place." We think, therefore, that the dog, on account of his superior intelligence and possession of the other traits which we have mentioned, in respect to the diligence and care which locomotive engineers owe to their owners and to them, must be placed on the same footing with that of a man walking upon or near a railroad track apparently in possession of all his faculties, and that the engineer would be warranted in acting upon the belief that the dog would be aware of the approaching danger, and would get out of the way in time to avoid the injury. As the engineer would be negligent if he ran over and injured or killed a man on the track who was apparently helpless, so he would be if he killed or injured a dog near or upon the track in a position which showed that he was helpless, or totally oblivious of his surroundings.

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In *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 45 S. W. 790, 40 L. R. A. 518, 66 Am. St. Rep. 754, the court allowed a recovery because it appeared that the dog which was killed was standing upon the track of the street railway, engaged in pointing some birds, which fact the motorman saw for a considerable distance before the car ran over the dog. Besides, we know of common knowledge that within this jurisdiction, at least, there is scarcely a household without a dog or dogs, that they are found in every street and public place, no limitation being put upon their free movements, and by the hundreds they daily pass in our cities and towns over the street railway track where and as often as they please. If, therefore, it should be required that motormen in charge of these cars should exercise the same degree of care to avoid running over a dog that the law requires of them to avoid injury to other animals, the public convenience of rapid transit in populous communities would be seriously impaired, and all business interests made to suffer. As the defendant's counsel say in their brief, "The dog would be absolute master of the situation, and would force the electric cars out of business." The true rule, we are satisfied, should be that street railway companies, when their cars are properly equipped, should not be held liable in damages for the killing of a dog by one of the street cars in motion, unless it was done under such circumstances as to justify the conclusion that the killing was done either willfully, wantonly, or recklessly.

The undisputed evidence in this case renders it unnecessary to discuss, according to the view of the law which we have announced, either of the alleged acts of negligence except the last one, to wit, the failure to properly equip the cars with fenders. The plaintiff, in his examination in chief, had testified as to the killing of his dog and its value. He was afterwards recalled, and then testified, over the defendant's objection, that he had measured one of the fenders on one of the cars, and found that it was 25 inches from the track on one side, and 23 inches from the track on the other side; and, further, that he saw several fenders that were about the same height from the track, and that there were three or four different kinds of fenders on the cars, and that the defendant used on the big cars a very different fender from that used on the little cars, and that it was a little car that ran over his dog. That evidence ought not to have been received. It was offered, of course, to prove that the fender upon the car that killed the dog was either improperly constructed or had been permitted to become defective, and the jury might draw the inference that, if the fender had been of standard make or in good condition, the dog would not have been killed. But it was not competent to show that the fender on the car which killed the dog was defective by evidence to the effect that a fender on one of many cars was

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defective or out of repair. The evidence would be too highly conjectural. Especially is this so in this case, as it appears from all the evidence that the plaintiff would have had no difficulty in identifying the car which killed the dog. The statement of the plaintiff, too, that there were several different kinds of fenders on the different cars, and that those on the big cars were very different from those on the little cars, and that one of the latter killed the dog, did not amount to evidence of any kind pertinent to the case. It did not tend to show which were the superior fenders or which were defective fenders—those on the big cars or those on the little cars. The evidence was misleading. And, besides, the very fact, if it existed, that the defendant had three or four different kinds of fenders, would make it quite clear that evidence of one kind of fender on one of the cars should not be used to show how another car was equipped as to the fenders. The motorman testified that the fender on the car which killed the dog was in good condition, and would do its work well, and there was no evidence to the contrary. The motion of the defendant to nonsuit the plaintiff because there was no evidence tending to show negligence on the part of the defendant, ought to have been allowed.

Error.

DOUGLAS, J., concurs in result.

LOUISVILLE & N. R. CO. v. PAYNTER'S ADM'X.

(Court of Appeals of Kentucky, Oct. 21, 1904.)

[82 S. W. Rep. 412.]

Contributory Negligence—Pleading—New Matter—Admission—Failure to Traverse.*

Civ. Code Prac. § 126, provides that every material allegation of a pleading must be taken as true, unless specifically traversed; and section 127 defines a "material allegation" as one necessary for the statement or support of a cause of action or defense: *held*, that since an allegation in a petition that deceased was in the exercise of ordinary care when he was killed was not material to the statement of a cause of action, contributory negligence being a matter of defense, an allegation of contributory negligence in the answer was new matter, which was admitted by failure to traverse by a reply.

Same—Same—Admission—Failure to Traverse.

That the allegation that deceased was exercising ordinary care when killed was repeated in an amended petition filed after the answer, and that the pleading was controverted of record, did not operate as a denial of the allegation of contributory negligence or take the place of a reply.

Hobson and Nunn, JJ., dissenting.

Appeal from Circuit Court, Larue County.

"Not to be officially reported."

*As to whether plaintiff must plead freedom from contributory negligence, see extensive note, 6 Am. & Eng. R. Cas., N. S., 353; *Haner v. Northern Pac. Ry. Co.* (Idaho), 19 Am. & Eng. R. Cas., N. S., 628 (absence of must be pleaded).

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Action by W. V. Paynter's administratrix against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Poston & Moorman, Edward W. Hines, and Benjamin D. Warfield, for appellant.

S. M. Payton and Robt. L. Greene, for appellee.

BARKER, J. W. V. Paynter was a brakeman in the employ of appellant. At the time of his death he was on a freight train being operated from Lebanon Junction to Bardstown Junction. At the latter place the conductor in charge of the train undertook to move 14 flat cars from the Y, and to place them on a siding. In executing this duty Paynter fell to the track, was run over, and instantly killed.

After the death of her husband appellant qualified as administratrix of his estate, and instituted this action to recover damages for his death. Her petition states a cause of action by alleging the death of her husband through the negligence of appellant and its employee, the conductor of the train, and in addition it negatives by anticipation the plea of contributory negligence, by alleging the exercise of ordinary care by the decedent at and before the time he was killed. The answer places in issue all of the material allegations of the petition, and in addition thereto pleads contributory negligence by the decedent. To this no reply was ever filed. Subsequently an amended petition was filed, reiterating all of the statements of the original, with additional allegations of negligence. This was controverted of record, and the case went to trial in the Larue circuit court at the October term, 1902. At the close of all of appellee's (plaintiff's) testimony the court, on motion, awarded the appellant a peremptory instruction to the jury to find for it, as in case of nonsuit. Afterwards, upon motion, the judgment was set aside, and a new trial awarded the plaintiff (appellee). Another trial resulted in a verdict for \$2,500 in favor of appellee, which was set aside by consent, and a new trial again awarded the defendant (appellant). A third trial resulted in the jury again finding a verdict in favor of the plaintiff (appellee) in the sum of \$2,500. The appellant now appeals from the order setting aside the first verdict rendered at the October Term, 1902, which awarded appellee (plaintiff) a new trial, and also from the last verdict against it.

The conclusion we have reached as to the pleadings in this case renders it unnecessary that the evidence concerning the manner of the death of appellee's intestate should be examined with more particularity than heretofore stated. Section 126 of the Civil Code of Practice provides: "Every material allegation of a pleading must, for the purposes of the action, be taken as true, unless specifically traversed. * * *". And section 127: "A material alle-

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gation is one which is necessary for the statement or support of a cause of action or defense." *Am. & Eng. Encycl. Law* (2d Ed.) vol. 5, p. 1, title "Contributory Negligence," says: "The authorities are well nigh unanimous that, in an action for negligence, the plaintiff need not allege that the injury of which he complains was occasioned without his fault, or that he was not guilty of contributory negligence, as the rule is that 'it is not necessary to allege matters which would come more properly from the other side,' and contributory negligence is considered a defense that the defendant must make." *Paducah, etc., R. Co. v. Hoehl*, 12 Bush, 41; *L. & N. R. Co. v. Wolfe*, 80 Ky. 82; *Louisville, etc., Canal Co. v. Murphy*, 9 Bush, 522; *Depp v. L. & N. R. Co.*, 14 S. W. 363, 12 Ky. Law Rep. 366. It follows, then, that the allegations of the petition negating the negligence of the decedent were immaterial, and the affirmative plea of contributory negligence in the answer was not responsive to them. What, then, was the effect of the failure of appellee to reply to the answer?

The case of the *Louisville & Nashville R. R. Co. v. Copas*, 95 Ky. 460, 26 S. W. 179, involved the identical question we have here, and in the opinion it is said: "The plaintiff in his petition had, by direct averment, negated any negligence on his part, still it was incumbent on the defendant to rely by plea on such contributory negligence on the part of the plaintiff as brought about the injury, and but for which the accident would not have happened. Here was affirmative matter that required a reply, and the defendant was entitled to a judgment on the pleadings. Was its right to such a judgment waived by failing to make a motion for such a judgment? It is not pretended that any reply was filed, or offered to be filed, and, even upon motion for a peremptory instruction, the court would have been compelled to sustain the motion if appraised of the condition of the pleadings; but the court was not required to examine the pleadings for the purpose, unless some motion was made for a judgment."

In the case of *Gore v. Illinois Cent. R. Co.*, 32 S. W. 754, 17 Ky. Law Rep. 799, the plaintiff had failed to controvert the affirmative allegations of the answer pleading contributory negligence. The opinion states the rule as follows: "For another reason the judgment must be affirmed. Section 386 of the Civil Code of Practice reads as follows: 'Judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him.' Appellant's failure to deny the allegations of the answer, which showed that the injury was the result of appellant's contributory negligence, entitled appellee to a judgment notwithstanding the verdict may have been for appellant. Had the jury returned a verdict for appellant, appellee could have moved the court to have returned a judgment for it, and, un-

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der the pleadings, such motion should have prevailed. This being true, appellant cannot complain, because in the condition of the pleadings the judgment must have gone for appellee, regardless of the instructions, evidence, or verdict." See, also, *L. & N. R. Co. v. Schweitzer's Adm'r*, 14 Ky. Law Rep. 855; *White v. L. & N. R. Co.*, 22 S. W. 219, 15 Ky. Law Rep. 49; *L. & N. R. Co. v. Mayfield*, 35 S. W. 924, 18 Ky. Law Rep. 224; *I. C. R. Co. v. Nall*, 51 S. W. 168, 21 Ky. Law Rep. 281; and *Brooks v. L. & N. R. Co.*, 71 S. W. 507, 24 Ky. Law Rep. 1318.

Under the pleadings in this case, the appellant was entitled to the peremptory instruction, regardless of the evidence, and the court erred in setting aside the order made at the October term, 1902. This being true, it follows that upon the return of the case the court should set aside the order granting appellee a new trial, and re-enter the first judgment. *Gherkin's Adm'r v. L. & N. R. Co.*, 30 S. W. 651, 17 Ky. Law Rep. 201; *Crowley v. L. & N. R. Co.*, 55 S. W. 434, 21 Ky. Law Rep. 1434; and *L. & N. R. Co. v. Ricketts*, 52 S. W. 939, 21 Ky. Law Rep. 662. The principle here enunciated is not militated against by that line of cases which hold that controverting a material allegation in a pleading, by alleging the converse of it in affirmative language, does not constitute new matter which must in turn be controverted. In those cases the question was, did the affirmative language constitute new matter? And in each case the court properly held it did not, and therefore no responsive pleading was required. That is not the case here. That the plea of contributory negligence is new, affirmative, material matter is not questioned, and, therefore, unless the provisions of the Code are to be abrogated, the failure to deny, for the purposes of the action, admits it to be true.

There is little cogency in the suggestion that because the allegation that appellee's intestate was exercising ordinary care at the time of his death is repeated in an amended petition filed after the answer, and the pleading was controverted of record, therefore the appellant must be held to have consented that the amendment denies the allegation of contributory negligence in the answer. The allegation of due care in the petition is not necessary to the appellee's cause of action; consequently it is immaterial, and we know of no rule which permits the repetition of an immaterial allegation to add anything to its value. In the science of pleading, as in mathematics, zero plus zero equals zero. Nor do we perceive upon what principle controverting an immaterial allegation puts it in a better attitude than if uncontroverted. The principle relied on in *L. & N. R. Co. v. Copas*, supra, is not obiter. It is decided there that the failure to controvert the allegation of contributory negligence was waived by failure to call the court's attention to the condition of the pleading

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by motion for judgment; but it was necessary to decide there was a defect before it could be decided that the defect was waived.

For the reasons indicated, the judgment is reversed for proceedings consistent with this opinion.

HOBSON and NUNN, JJ., dissenting.

CHICAGO & E. I. R. CO. et al. v. COGGINS.

(Supreme Court of Illinois, Oct. 24, 1904. On rehearing, Dec. 7, 1904.)

[72 N. E. Rep. 376.]

Appellate Court—Right to Review.

A point not made in the Appellate Court cannot be considered on appeal in the Supreme Court.

Accident at Crossing—Contributory Negligence—Instruction—Time of Using Care.

Where a railway company in an action for personal injuries sustained by being struck by a train requested an instruction that plaintiff could not recover unless he was using reasonable care for his safety "at the time of the accident," it cannot complain of the court's use of the words "immediately before and at the time of the accident" on the ground that the words used by the court restricted the jury to a consideration of plaintiff's conduct only after he had placed himself in a dangerous position.

Same—Same—Same—Calling Attention of Jury to Particular Facts.

An instruction, in an action against a railway company for personal injuries sustained by being struck by a train at a street crossing, that plaintiff could not recover if he failed to use reasonable care "to ascertain whether any train was approaching" before he entered on the track, was properly refused because it was apt to mislead the jury by emphasizing the duty of plaintiff with regard to the exercise of due care, thereby drawing the jury's attention to particular facts.

Appeal from Appellate Court, First District.

Action by Dominick Coggins against the Chicago & Eastern Illinois Railroad Company and another. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendants appeal. Affirmed.

This was an action on the case, brought in the superior court of Cook county on October 20, 1899, by Dominick Coggins, appellee, against the Chicago & Eastern Illinois Railroad Company and the Chicago & Western Indiana Railroad Company, the appellants, to recover for personal injuries received by Coggins from being struck by a locomotive attached to a train of cars and belonging to and operated by the first above named railroad company. The track on which the engine and cars were being run at the time of the injury belonged to the last above named railroad company, and it was made a defendant on the theory that it was liable for the injury because it was the lessor of the company whose engine and cars inflicted that injury.

The accident occurred at the intersection of Root street, and east and west street in Chicago, with the railroad track above referred to. There are also a number of other parallel railroad tracks at this place, running north and south. The three eastern tracks are known as the "Pennsylvania tracks." Immediately west of them are the tracks of the Chicago & Western Indiana Railroad Company, referred to as the "Indiana tracks." These are four in number. The one farthest east is used for north-bound passenger trains, the one next west for south-bound passenger trains, and the other two for freight trains. West of these Indiana tracks are the Wabash tracks, there being four or five of them. An ordinary railroad gate is located immediately west of the Indiana tracks, being between those tracks and the Wabash tracks. The same kind of gate is also located immediately east of the Pennsylvania tracks. The entire surface of Root street at this intersection is covered with planks. There are also sidewalks on the north and south sides of the street crossing the tracks. There is no depot or ticket office there, and no tickets are sold from that point. About 600 feet north of Root street there is a surface crossing with the tracks of another railroad. This again occurs at a point 937 feet north of Root street. The evidence tends to show that all north-bound passenger trains running on the Indiana tracks stop at Root street and take on and discharge passengers, but that south-bound trains do not stop there. The testimony of appellants was to the effect that the north-bound trains stopped at this point on account of the two crossings with the tracks north, which are above referred to, and not for the purpose of receiving or discharging passengers; that no signals were there given by any member of the train crew to the engineer to start the train; and that when persons did get on there fares were collected from the last preceding station to the destination of the passenger.

The evidence tends to show that on the morning of September 9, 1899, appellee left Flanley's Empire House, where he was working, to go to the Polk Street Depot to meet his sister-in-law, who was expected to arrive on a train about 7:30 o'clock that morning. He rode on a street car going east until he reached the railroad tracks above mentioned. He then saw a north-bound passenger train, belonging to the Chicago & Eastern Illinois Railroad Company, standing across Root street, the engine being north and the last coach south of that street. He left the street car, and walked across the Wabash tracks in a southeasterly direction until he came to the south sidewalk, and then proceeded east on that sidewalk across the two freight tracks of the Indiana Railroad Company. While crossing the third track from the west, a south-bound passenger train belonging to the Chicago & Eastern Illinois Railroad Company struck him, inflicting the injuries complained of in this suit. He testified that

when he left Flanley's Empire House he intended to go to the Root street railroad crossing and take a train to the Polk Street Depot; that when he left the street car he started across the tracks to board the north-bound train, which was standing there, and which belonged to the last-mentioned railroad company. The evidence tends to show that this north-bound train stopped several minutes on this occasion while persons were getting off and on the cars, and that, had appellee not been struck by the south-bound train, he would have had ample time to board the north-bound train, as he testified it was his intention to do. The evidence also tends to show that the gates west of the Indiana tracks were open at the time appellee went upon those tracks and also at the time he was struck, and further tends to show that the bell was not ringing, and that the whistle was not blown until just as the engine struck appellee. Coggins testified that before going upon the tracks he looked both north and south for approaching trains, and saw none, but that he did not look north again after he had passed within the west gate; that although his senses of sight and hearing were exceptionally good, he received no warning of the approach of the train.

At the close of the evidence for the plaintiff the defendants moved the court to give an instruction, in writing, directing the jury to return a verdict for the defendants. The motion was denied, and the instruction refused. At the close of all the evidence a similar motion was made and instruction offered, with the same result. The jury returned a verdict for \$12,500 in favor of the plaintiff, on which judgment was subsequently rendered, motions for a new trial and in arrest of judgment having been, respectively, overruled. The cause was taken to the Appellate Court for the First District, where the judgment of the superior court was affirmed, and appellants now appeal to this court.

The cause was tried upon counts of the declaration numbered 5, 6, and 7. The fifth charges a violation of the statutory duty to ring the bell or sound the whistle as the south-bound train approached Root street. The sixth charges that the Chicago & Eastern Illinois Railroad Company habitually stopped its north-bound passenger trains at the Root street crossing and habitually received and discharged passengers there, and that in violation of its duty to intending passengers it carelessly and negligently ran the south-bound train over the crossing upon a track next to and parallel with the track upon which the north-bound passenger train was standing. The seventh count charges that the negligence consisted in failing to keep the tracks next to the standing train free from moving locomotives, and in negligently running the south-bound train past the standing train at a high rate of speed.

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Calhoun, Lyford & Sheean, for appellants.

James W. Duncan, C. Le Roy Brown, and Charles J. Gould, for appellee.

SCOTT, J. (after stating the facts). Appellants first contend that under their twelfth instruction which was given to the jury the court conditioned the right of plaintiff to recover herein upon the existence of the relation of carrier and passenger between the parties, thus limiting the issues to be decided by the jury; that there is no evidence in the record tending to show such relation, and for that reason the judgment should be reversed. Appellee, having obtained leave, filed in this court a certified copy of appellants' brief and argument in the Appellate Court. It appears therefrom that this point was not made in that court; consequently it cannot be considered here.

Appellants also question the action of the circuit court in modifying, and in giving as modified, their eleventh instruction, and in refusing their fourteenth and fifteenth instructions. The eleventh instruction, as requested, read as follows:

"The plaintiff cannot recover in this case unless it is proved by a preponderance of the evidence not only that the defendants were guilty of the negligence charged against them in the plaintiff's declaration, or some count thereof, but that Coggins was using reasonable care for his safety at the time of the accident; and if the jury shall find from the evidence that Coggins did not use reasonable care to ascertain *whether any train was approaching from the north and carelessly placed himself on or alongside of the track on which the south-bound train was running so near to it as to expose himself to the danger of being struck by the said train, or carelessly stepped in front of said train as it had almost reached him, then the plaintiff cannot recover, and their verdict should be for the defendants.*"

The court modified the instruction by striking out the portion italicized and inserting in lieu thereof the following: "Or ordinary care for his own safety immediately before and at the time of the accident complained of, then the plaintiff cannot recover, and their verdict should be for the defendants," and gave the instruction so modified to the jury. It is not urged that there was error in giving the instruction as modified, except it is said that the use of the term "immediately before and at the time of the accident" restricted the jury to a consideration of the conduct of the plaintiff only after he had placed himself in a dangerous position, and would lead them to disregard his conduct prior thereto, even though the evidence showed that he was guilty of negligence in having placed himself in a position of danger. As appellants used the expression "at the time of the accident," in drawing the first part of the instruction, to specify the period during which Coggins was required to use reasonable care,

they are not in a position to urge this objection. But the point is without merit in any event. *Lake Shore & Michigan Southern Railway Co. v. Johnsen*, 135 Ill. 641, 26 N. E. 510; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Keenan*, 190 Ill. 217, 60 N. E. 107. Appellants contend, however, that, as given, this instruction is a mere abstract proposition of law, and that there was error in modifying it, because they were entitled to have the principle therein stated applied to the facts of the case, and to have the jury's attention directed to the plaintiff's failure "to take any means to ascertain whether any trains were approaching before appellee entered upon the track"; and it is urged that appellants had the right to have the jury pass upon the question whether appellee used reasonable care to ascertain whether any train was approaching from the north, and that they were entitled to an instruction calling the attention of the jury to the fact that it was the duty of appellee, not merely to use reasonable care "to avoid injury by the train after discovering its approach, but also to exercise reasonable and ordinary care to ascertain whether any such train was approaching." We are inclined to the view that this instruction, as requested, violates the rule that "an instruction should not draw the attention of the jury to particular facts." *Chapman v. Cawrey*, 50 Ill. 512; *Drainage Com'rs. v. Illinois Central Railroad Co.*, 158 Ill. 353, 41 N. E. 1073. It was apt to mislead the jury by emphasizing the duty of plaintiff with regard to the exercise of due care to avoid danger from the particular train approaching from the north as he crossed the tracks toward the north-bound train. It was his duty to exercise reasonable care for his personal safety. His mind would naturally be intent upon reaching the north-bound train and entering it in safety before it began moving. Trains might pass either north or south upon the tracks. Teams and vehicles of various kinds might come upon the crossing. It was his duty to use reasonable care to avoid danger from trains passing in either direction and from every other agency from which injury might be received, and it would have been proper to have so instructed the jury; but to call their attention particularly to his duty to exercise such care to ascertain whether any train was approaching from the north was to call their attention to the fact that, if he had stopped as soon as he came upon the Chicago & Western Indiana tracks, and turned and looked to the north, he could have seen the approaching train, and avoided injury, and might have led the jury to conclude that a failure to take that course would necessarily bar a recovery.

In *Chicago, Burlington & Quincy Railroad Co. v. Gunder-son*, 74 Ill. App. 356, it was held that an instruction was erroneous which advised the jury that a person going upon a railroad track "must look both ways, listen for trains, and avoid being injured by them, if he can do so by the exercise

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of reasonable care and caution." The case came to this court, where the judgment of the Appellate Court was affirmed in *Chicago, Burlington & Quincy Railroad Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708. We regard the instruction under consideration there and the one now before us as alike in principle.

No error was committed in refusing the fourteenth and fifteenth instructions asked by appellants, as each was objectionable in the same respect as was the eleventh in its original form.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

On Rehearing.

SCOTT, J. Appellants now insist that their eleventh instruction, as requested, is in substance identical with appellant's twelfth instruction in *C. C. Ry. Co. v. O'Donnell*, 208 Ill. 267, 70 N. E. 294, 477, the refusal of which was in that case held to be error. We are entirely satisfied with the views there expressed relative to that instruction, but the one now before us is materially different. The instruction in the *O'Donnell* Case submitted to the jury the question whether ordinary care required the party injured to ascertain before going upon the track whether a car was approaching, and the question whether, before going upon the track, he could, by the exercise of ordinary care, have ascertained whether a car was approaching. The instruction now before us omits both of these propositions. In the case in 208 Ill., 70 N. E., the instruction submitted to the jury for their consideration every question necessary to be decided in determining whether the party injured had exercised due care. The instruction here does not submit every such question, and is objectionable because it directs the attention of the jury particularly to those facts upon which the questions which it does submit arise. The petition for rehearing will be denied.

Rehearing denied.

INDIANA, I. & I. R. CO. v. OTSTOT.

(Supreme Court of Illinois, Oct. 24, 1904.)

[72 N. E. Rep. 387.]

Injury to Section Hand—Contributory Negligence—Question for Jury.

In an action by a railroad section hand for injuries resulting from being struck by an engine while at work between the rails, evidence examined, and whether plaintiff was in the exercise of due care at the time of the accident, *held* to be a question for the jury.

Negligence—Question for Jury.

Whether defendant was guilty of negligence, *held* to be a question for the jury.

Assumption of Risk—Question for Jury.

Whether plaintiff had assumed the risk, *held* to be a question for the jury.

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Fellow Servants—Section Hand and Engineer—Different Departments—Question for Jury.*

Whether the employee of the defendant in charge of the engine by which plaintiff was injured, and the plaintiff, a section hand, were employees whose duties brought them into such habitual association as would afford them power and opportunity of exercising an influence, each upon the other, promotive of their mutual safety, and therefore fellow servants, was a question for the jury.

Same—Different Departments—Limitation.*

To create the relation of fellow servants, the employees must be directly co-operating with each other in a particular work at the time of the injury, or their usual duties must be such as to bring them into such habitual association as will afford them the power and opportunity of exercising an influence, each upon the other, promotive of their mutual safety.

Instructions.

Where a party offers several instructions embodying the same proposition in varying language, some only of which are given, he will not be heard to complain because the court refuses the one the party considers most important.

Damages—Jury Questions—Instructions.

In an employee's personal injury suit, a charge that the jury should not arrive at their verdict by chance, and, in the event of a finding for plaintiff, should not determine the amount by adding the amount individual jurors think ought to be awarded and dividing the sum by the number of jurors voting, was properly refused, where it was coupled with incorrect and misleading statements of the law of negligence, and in reference to the duty of a juror to refrain from consenting to a verdict which does not meet with the approval of his judgment.

Signals—Positive and Negative Testimony—Instructions.†

Instructions to the effect that affirmative testimony of witnesses that they heard a bell ring is of more force as evidence than opposing statements of witnesses of equal credibility that they did not hear the bell ring are properly refused when not based on the hypothesis of equal opportunity.

Remarks of Counsel.

Counsel has no right to advise the jury that he does not intend to ask any instructions.

Same—Harmless Error.

At the close of the evidence the court, in the presence of the jury, addressing counsel, directed them to pass up their instructions. Counsel for plaintiff replied, "We haven't any instructions to pass up, your honor." Objection was made by defendant, and sustained: *held* that, as the statement was elicited by the court's direction and was directly responsive thereto, and as defendant obtained the only relief that it asked, which was that its objection be sustained, the remarks of counsel were not cause for reversal of a judgment for plaintiff.

Appeal from Appellate Court, Second District.

Action by Henry Otstot against the Indiana, Illinois & Iowa

*For authorities in this series on the subject of the different department limitation of the fellow-servant rule, see foot-note appended to *Indianapolis & G. R. T. Co. v. Foreman* (Ind.), 11 R. R. R. 214, 34 Am. & Eng. R. Cas., N. S., 214.

†As to the comparative weight of negative and affirmative testimony as to whether or not crossing signals were given, see foot-note appended to *Chicago, etc., Ry. Co. v. Andrews* (C. C. A.), 12 R. R. R. 584, 35 Am. & Eng. R. Cas., N. S., 584; foot-note appended to *St. Louis & S. F. R. Co. v. Brock* (Kan.), 12 R. R. R. 613, 35 Am. & Eng. R. Cas., N. S., 613.

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Railroad Company. From the judgment of the Appellate Court (103 Ill. App. 136) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Glennon, Cary & Walker and Reeves & Boys, for appellant.
Arthur H. Shay, Browne & Wiley, and Brewer & Strawn, for appellee.

SCOTT, J. This is an appeal from a judgment of the Appellate Court for the Second District, affirming a judgment of the circuit court of La Salle county for the sum of \$8,000, recovered by appellee against appellant for personal injuries.

One terminus of appellant's railroad is at Streator, Ill., where it has extensive switchyards. Lundy street, in that city, is a street running east and west. North from that street, in the following order and parallel thereto, are Livingston, Wilson, Bridge, and Main streets. Between Lundy street and Main street the main track of appellant runs north and south. This track approaches Lundy street from the south, and, together with all the other tracks of appellant, terminates at or near Main street. The depot is located on Bridge street, about one block south of the terminus of appellant's tracks. About 100 feet south of Lundy street a switch leaves the main track on the east side, and runs first in a north-easterly direction. As it approaches Main street, however, it gradually turns in a northwesterly direction, and again intersects the main track. This switch is known as the "lead track." Between this lead track and the main track are five switch tracks, which are parallel with the main track and connect at both ends with the lead track. Where the lead track leaves the main track south of Lundy street, is switch stand No. 1. Following the lead track northeast, switch stand No. 2 is located at the intersection of the first switch track with the lead track, switch stand No. 3 at the intersection of the second track, and switch stand No. 4, where the accident hereinafter mentioned occurred, at the intersection of switch track No. 3.

Appellee was a section hand, and on the morning of February 7, 1900, at 7:15 o'clock, the section gang, composed of Harry Sawyer, the foreman, and of Mull, Lantzer, and appellee, section hands, was proceeding south on a hand car on the main track, for the purpose of going to the round-house, which was situated in the yards south of Lundy street, for the purpose of cleaning out the ash pit. When they got to Lundy street they found the main track south of them blocked, and the foreman directed them to take the hand car off the track and clean out the switch points along the lead track. They first commenced work at switch stand No. 2, then moved to No. 3, and then to No. 4. While engaged in throwing out the water that had collected between the rails at switch stand No. 4, Mull and appellee were standing

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between the rails, facing south. At that time Mumaw, a hostler in the employ of the appellant, backed locomotive engine No. 9 south on switch track No. 4, which is next east of switch track No. 3, and intersects the lead track at switch stand No. 5. The engine followed the switch to the lead track, and then came along the lead track until the tender struck appellee, knocking him down. The two rear wheels ran over his left leg, necessitating its amputation, and he was otherwise injured. Mull, one of the other sectionmen, who was working alongside of appellee and facing the same way, was struck and slightly injured at the same time.

Appellee brought suit, and filed a declaration consisting of five counts. The first charges negligence in driving the engine along the track; the second charges negligence in that the hostler failed to ring a bell or sound a whistle to warn appellee of the approach of the engine; the third count charges willful and wanton negligence on the part of the hostler in charge of the engine; the fourth count charges that the defendant failed to furnish a sufficient number of servants to properly operate the engine, and carelessly and negligently placed the same in the care of but one of its servants; the fifth charges that the defendant carelessly and negligently placed the engine in charge of an unskillful and reckless person. The plea was "not guilty." At the close of the plaintiff's evidence, and again at the close of all the evidence, appellant moved the court to direct a verdict for the defendant. The motion was denied in each instance, and this action of the court is assigned as error, and the question is thereby presented whether there is any evidence in the record which, with the legitimate inferences to be drawn therefrom, is sufficient to warrant a verdict in favor of the plaintiff.

It is first insisted that there is no evidence that appellee was in the exercise of due care for his own personal safety at the time of the accident, and this is based on the fact that he did not keep such a lookout to the north and back of him, at the place where he was working, as would enable him to ascertain that the engine was approaching from that direction. He had been in the employ of the appellant as a section hand for two years. His duties, ordinarily, were confined to the switch yards at Streator, which extended from Main street, where all the tracks terminated, south and east along the main track a distance of $2\frac{1}{2}$ to 3 miles. In some emergencies, however, he was sent out to work at places beyond the yards, as the exigencies of the business of appellant required. On the morning in question, engine No. 9 came in with a freight train about 6:45 a. m. It stopped at the roundhouse, which is about a mile from Main street, for the hostler, and then proceeded north to the depot, which was near Main street. There it was uncoupled, and the hostler took it over on the switch to a place just south of Livingston street, where it was standing prior to the time it was moved south

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at the time the accident occurred, and it stood there for about a half hour. That place is about 180 feet north of switch stand No. 4. When appellee was at work just prior to the accident, there was an engine in the yards south of Lundy street switching freight cars, and using the switch tracks and the lead track upon which the appellee was at work. Appellee was facing south, and this engine which was engaged in switching freight cars was south of him. He testified that he did not know that there was any engine in the yards north of him, and that as he worked he looked around every one or two or three minutes to see whether any engine was approaching from the north, but did not see engine No. 9, or know that it was north of him, until it struck him. It is not contended that he was in an improper place or position to do the work which he had been directed to do by his foreman. His attention would naturally be engrossed by his occupation. He knew of the engine working south of him, and would be on the alert to avoid any danger from that direction. He did not know of the one north of him. Under these circumstances, we regard the question whether he was in the exercise of due care as one for the jury.

When Mumaw took charge of the engine, he backed it down from Main street on track No. 4 until he crossed Livingston street. There he stopped the engine and waited until the tracks south of him were cleared by the switch engine so that he could reach the roundhouse. There is evidence that at the time of starting the engine south, after the tracks were cleared, just before the accident, Mumaw knew that these section hands were working on the track at switch stand No. 4, and that he started the engine and ran it over the distance intervening the point at which it had been stopped, just south of Livingston street and the point where it struck the appellee, without ringing the bell, or sounding the whistle, or giving other warning of its approach. From this evidence the jury might well infer negligence on the part of the appellant.

Counsel suggest that the injury to appellee resulted from a risk which he had assumed. The evidence tends to show that the proximate cause of the accident was the negligence of the defendant in failing to give appellee warning of the approach of the engine, and it appeared from the testimony of appellee that he had frequently seen Mumaw in charge of a moving engine when the whistle was not sounding and the bell was not ringing, and it is said that by reason of this fact, and of the further fact that he had not made any complaint of Mumaw's conduct in this regard, he had assumed the risk of any injury that he might receive as a result of Mumaw operating an engine without ringing the bell or sounding the whistle. If it be conceded that counsel's view is correct in this respect so far as it might concern appellee if he had

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come upon the track on which the engine was moving after it was in motion, we are still of opinion that whether or not appellee had assumed the risk resulting from the failure of Mumaw to give notice of the fact that he was about to start an engine standing at a point less than 200 feet from the place where he knew appellee was working on the track which the engine would follow when in motion, and from the failure to give warning that the engine was approaching after it was in motion, was one for the jury. While appellee knew that Mumaw moved the engine through the yards with bell and whistle both silent, we do not think it can be said as a matter of law that he thereby assumed the risk that Mumaw would deliberately start an engine and run it upon men who he knew were working on the track at a point not more than 200 feet from the starting place of the engine, without giving them any warning whatever.

It is next insisted that the evidence in this case is such that all reasonable minds must reach the conclusion that Mumaw, whose negligence caused the injury, and appellee were fellow servants. To create that relation between servants, they must be directly co-operating with each other in a particular work at the time of the injury, or their usual duties must be such as to bring them into such habitual association as will afford them the power and opportunity of exercising an influence, each upon the other, promotive of their mutual safety. *Chicago & Northwestern Railroad Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Pagels v. Meyer*, 193 Ill. 172, 61 N. E. 1111; *Duffy v. Kivilin*, 195 Ill. 630, 63 N. E. 503. It is not claimed that appellee and Mumaw were fellow servants within the first division of the rule, but it is claimed that their usual duties brought them into such habitual association as afforded them the power and opportunity of exercising an influence over each other promotive of mutual safety. It appears from the evidence of appellee that it was his duty and the duty of the sectionmen with whom he worked to keep the railroad tracks in repair, and that their usual duties included work on all the tracks in the yards at Streator. Mumaw's duties were to take engines from the depot to the roundhouse when they came in off the road, and to fetch them from the roundhouse to the depot when they were needed to go out on the road. Both appellee and Mumaw worked during daytime. It appears that on several occasions appellee had ridden on an engine with Mumaw on Sunday when appellee went to the roundhouse to clean out the cinder pit, but that his duties did not require him to ride there, and that he was not directed to ride there by appellant, and that he did it to save walking the distance to the roundhouse. It also appears that appellee saw Mumaw practically every day; that is, Mumaw would be going back and forth on an engine through the yards while appellee was at work there. Whether they saw each other, however, or came in

contact with each other, or whether any of the sectionmen saw Mumaw or came in contact with him, was purely a matter of chance. The duties of the sectionmen never necessarily brought any of them into association with Mumaw, and his duties did not at any time necessarily bring him into association with any of them. They were employed in different departments, and the work of the sectionmen had no connection whatever with that of the hostler. He might never be brought into association with any of them. Such association as there was between Mumaw and the section men was purely accidental, resulting from the fact that they happened to be working in the part of the yards through which he passed in the performance of his duties in taking engines to and from the roundhouse at a time when he had occasion to move an engine through that portion of the yards. Under these circumstances we cannot say that the evidence is such that all reasonable minds must conclude that Mumaw and appellee were fellow servants.

Appellant requested the court to give to the jury 34 instructions, which cover 17 printed pages of the abstract. These instructions seem more voluminous and numerous than there was occasion for, in view of the few and simple issues involved in this cause. The first 22 of these were given. The last 12 were refused. The refusal of each of the 12 is assigned as error. No. 23 announced the doctrine of assumed risk. Nos. 17 and 20 "given" correctly laid down the law on this subject, the only difference being that No. 23 points out the duty of an employee who discovers an extraordinary hazard in the service which did not exist, or of which he did not have knowledge, when he entered the service. While this instruction stated the law correctly, we do not regard its refusal as error, in view of the fact that 17 and 20 were given. Had the seventeenth and twentieth not been offered and given, the twenty-third should have been given. Where a party thus offers two or more instructions embodying the same proposition in varying language, he will not be heard to complain because the court refuses the one the party considers most important, where the others are given. He can avoid this difficulty by requesting the giving only of the instruction which is most satisfactory to himself on that subject.

No. 24 is to the effect that if it was the duty of each of the section hands to look out for himself and the other members of the section gang, and to give each other warning of approaching trains or engines, and that if the man Lantzer, who was working with appellee, neglected this duty, then appellee cannot recover. There is no evidence that Lantzer owed any such duty to appellee. The instruction was properly refused.

No. 25 advised the jury not to arrive at a verdict by chance, and, in the event of finding a verdict for the plain-

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tiff, not to determine the amount by adding the amount individual jurors think ought to be awarded, and dividing the sum so obtained by the number of jurors voting; but these propositions were coupled with an incorrect statement of the law of negligence, and with a misleading statement of the law in reference to the duty of a juror to refrain from consenting to a verdict which does not meet with the approval of his judgment.

The 26th, 28th, and 30th deal with the doctrine of assumed risk, and we regard that subject as having been sufficiently covered by the 17th and 20th instructions.

The thirty-second and thirty-third were in substance that the affirmative testimony of witnesses that they heard a bell ring was of more force as evidence than opposing statements of witnesses of equal credibility that they did not hear the bell ring. In the case at bar, appellant contended that Mumaw started the bell ringing before he moved the engine from the place where he had stopped it, south of Livingston street, and kept it ringing continually until after the accident occurred. A man by the name of Ferriter testified that he was on the engine before it started, with Mumaw, and continued there with him until after the accident occurred, and that he heard no bell rung or whistle sounded on that engine prior to the accident. Another witness, by the name of Pryor testified that he was on the switch engine which stood on track No. 1, about 30 feet from the point where the accident occurred, which would be about 200 feet from the place where engine No. 9 stood after being stopped on the south side of Livingston street, and that he heard the bell on engine No. 9 ringing just as that engine started south, immediately before the accident. It is apparent that the rule announced by these last-mentioned instructions could not properly be applied to these two witnesses. Where the trial court refused a similar instruction asked by defendant, and there was a judgment for the plaintiff, this court declined to reverse the judgment in *Atchison, Topeka & Santa Fe Railroad Co. v. Feehan*, 149 Ill. 202, 36 N. E. 1036, and said: "The force and weight to be given to the testimony of the respective witnesses is a matter to be determined by the jury, and with which the court should not ordinarily interfere." In any event, an instruction which attempts to advise the jury that, in determining whether a bell did ring, the testimony of a witness who testifies affirmatively that a bell was rung is of greater weight than that of a witness who testifies that he did not hear it ring, should be based on the hypothesis of equal opportunity. The instructions before us are defective in this respect.

We have been favored with no statement showing that there was error in the refusal of the 27th, 29th, 31st, and 34th instructions, and it is therefore unnecessary to discuss them.

At the close of all the evidence, the court, in the presence

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of the jury, after being advised that the proof was all in, addressing counsel on both sides, said, "Well, pass up your instructions and proceed with your arguments." Thereupon counsel for appellee replied, "We haven't any instructions to pass up, your honor." Counsel for appellant objected to this statement, made in the presence of the jury. Thereupon counsel for appellee responded, "We have a right to tell the jury that we are not going to ask any instructions." Objection was made to this statement, and the court, after expressing regret that the statement had been made, sustained the objection. Counsel for appellee was mistaken in saying that he had a right to advise the jury that he did not intend to ask any instructions. So far as the jury is concerned, the instructions are the instructions of the court, given as the court's view of the law, and the jury should not be informed at whose request they are given. This court long since condemned the practice which once prevailed of writing the words "plaintiff's" and "defendant's" on the instructions requested by the respective parties. *Aneals v. People*, 134 Ill. 401, 25 N. E. 1022. The statement made by counsel for appellee in this case conveyed to the jury precisely the information which this court intended to prevent when it disapproved the practice of so marking instructions. Where the jury are advised that certain instructions are given at the request of one of the parties, there is danger that they will look upon such instructions as in the nature of an argument in favor of the party requesting them, instead of an impartial statement of the law. Appellant, however, obtained the only relief it asked, which was that its objection to the statement be sustained. The action of the court in sustaining an objection made to improper remarks or conduct of an attorney in the cause will not always be regarded as purging the record of error. *West Chicago Street Railroad Co. v. Sullivan*, 165 Ill. 302, 46 N. E. 234. In this instance the statement to which the original objection was made was elicited by the court's request or direction to pass up the instructions, and was directly responsive thereto. We do not consider the objectionable conduct of counsel under the circumstances here disclosed such as to warrant a reversal.

The judgment of the Appellate Court will be affirmed. judgment affirmed.

BRUSSEAU v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts, Bristol, Nov. 23, 1904.)

[72 N. E. Rep. 348.]

Accident at Crossing—Absence of Signals.

In an action against a railroad for the death of one killed in a crossing accident, *held*, that the evidence was sufficient to warrant a finding that the absence of the signals required by the statute contributed to the injury.

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Same—Gross Negligence—Burden of Proof.*

In an action against a railroad company for the death of one killed in a crossing accident, the burden was on defendant to show that plaintiff was grossly negligent.

Same—Same—Question for Jury.

In an action against a railroad for the death of one killed in a crossing accident, *held*, that the question whether plaintiff's intestate was guilty of gross negligence was one for the jury.

Exceptions from Superior Court, Bristol County; Lemuel Le B. Holmes, Judge.

Action by Mary Brusseau, as administratrix of James Brusseau, against the New York, New Haven & Hartford Railroad Company. Verdict for plaintiff, and defendant brings exceptions. Judgment on the verdict.

John W. Cummings and Edward Higginson, for plaintiff.
F. S. Hall and C. C. Hagerty, for defendant.

HAMMOND, J. The evidence as to whether the signals required by the statute were given was conflicting, but it cannot be said, as matter of law, that it did not justify the jury in finding for the plaintiff on that issue. See *Dalton v. N. Y., N. H. & H. R. R.*, 184 Mass. 344, 68 N. E. 830, and cases cited. If the signals were not sounded, the jury, under the circumstances, might infer that the absence of them contributed to the injury. *Doyle v. Boston & Albany R. R.*, 145 Mass. 386, 14 N. E. 461.

The burden was upon the defendant to prove that the plaintiff's intestate was grossly negligent, and it is vigorously contended that, as matter of law, the evidence shows that he was. Although there are cases in which it has been adjudicated, as matter of law, that, under the circumstances, gross negligence was proved (*Debbins v. Old Colony R. R.*, 154 Mass. 402, 28 N. E. 274; *Emery v. Boston & Maine R. R.*, 173 Mass. 136, 53 N. E. 278), still, speaking generally, the question whether a particular fact is proved by oral testimony depends largely upon the view taken by the jury as to the credibility of the witnesses; and hence it is comparatively seldom that, in the absence of binding admissions or agreements as to facts, a ruling that, as matter of law, a material fact has been proved, can be given. The evidence in this case tended to show that the plaintiff's intestate was sober, and was driving a quiet and gentle horse at a moderate speed; that in his wagon there were bottles, which rattled; that when near the crossing he shouted "Whoa" to his horse; that the wagon cover extended over the whole side of the wagon; that there was no bell or whistle to warn him; that for some few minutes before reaching the crossing he had been traveling on a street parallel with and near to the

*As to the presumption of due care on the part of one killed by a train, see foot-notes appended to *Bain v. Northern Pac. Ry. Co.* (Wis.), 12 R. R. R. 31, 35 Am. & Eng. R. Cas., N. S., 31.

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railroad location; that, as he turned into Sawyer street and approached the crossing, his view of the track upon which the train was coming was obstructed by freight cars standing near Sawyer street; that the gates seemingly intended to warn passengers of approaching trains were up; and that the night was somewhat foggy. The evidence tended further to show that he was awake and guiding his horse. It was not shown that he observed the absence of the gateman, or that he knew that none was usually kept there at night, or that he was not listening for the train. It was near midnight, and, from the absence of the signals, and the fact that the gates were not lowered, he had some reason to believe that no train was approaching, and that it was safe to cross. His ability to hear may have been affected by the rattling of the bottles and by the noise of the team. It is true that the evidence was conflicting as to many of the circumstances above named—especially with reference to the giving of the signals required by statute—and a verdict for the defendant might reasonably have been expected; but, without rehearsing it further in detail, it is plain that the question whether the plaintiff's intestate was guilty of gross negligence was not a question of law for the court, but of fact for the jury, and that the case was rightly submitted to them.

Judgment on the verdict.

EVENSEN v. LEXINGTON & B. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Worcester, Nov. 23, 1904.)

[72 N. E. Rep. 355.]

Collision between Street Car and Team—Imputed Negligence of Driver.*

The right of one who has intrusted himself to the care of another, with whom he is driving, to recover for injuries caused by the negligence of a street car company, is dependant on the exercise of due care by his companion.

Same—Care on Part of Driver—Question for Jury.

In an action for injuries to a person in a wagon, caused by a collision with a street car, whether the driver of the team was in the exercise of due care *held*, under the evidence, a question for the jury.

Same—Gross Negligence—Question for Jury.

In an action for injuries to a person in a wagon, caused by collision with a street car, whether the motorman of the car was guilty of gross negligence, within the meaning of Rev. Laws, c. 171, § 2, authorizing a recovery for the death of a person caused by gross negligence, *held*, under the evidence, a question for the jury.

Exceptions from Superior Court, Worcester County.**Action by Eline A. Evensen, administratrix of the estate**

*See foot-note appended to *Duval v. Atlantic Coast Line R. Co.* (N. Car.), 11 R. R. R. 235, 34 Am. & Eng. R. Cas, N. S., 235; *Carney v. Concord St. Ry.* (N. H.) 11 R. R. R. 307, 34 Am. & Eng. R. Cas., N. S., 307 (negligence of parents of child non sui juris cannot be imputed to the child).

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of Martin Evensen, against the Lexington & Boston Street Railway Company. There was a verdict for defendant, and plaintiff excepted. Exceptions sustained.

This was an action of tort brought by the plaintiff, in her capacity as administratrix of the estate of Martin Evensen, against the defendant, for the use and benefit of herself and seven minor children, on account of the death of her intestate. The declaration is in two counts. The evidence material to the issues raised was as follows: At about quarter before 6 on the evening of January 29, 1902, the plaintiff's intestate was riding at a speed of about four miles an hour, in a farm wagon owned and driven by one Martin Helchier, down Academy lane, toward Sudbury Road, which is one of the principal highways in the thickly settled part of Concord, Mass. They were on their way to Helchier's home, where Evensen was visiting. The wagon containing Helchier and Evensen came into collision with an electric car of the defendant company proceeding in a northerly direction along Sudbury Road from Thoreau street, so called, toward Main street. Evensen was thrown from the wagon to the ground, and received injuries from which he died without conscious suffering. Academy lane is a public highway running from Middle street easterly to Sudbury Road, about 12 feet wide, with sidewalks on both sides, and along the edge of the sidewalk on the south side thereof, between said road and said street, are quite large elm trees, about 2 or 3 feet through, with branches overhanging said lane. Sudbury Road is about 50 feet wide, and macadamized, and on the edge of the sidewalk, on the Selmes side, and southerly from Academy lane, are large elm trees, about 2 or 3 feet through, with branches overhanging the street. The trees are shown by black circles on the plaintiff's plan, and distances between trees are shown by red figures thereon. Defendant's location runs in a straight course down a slight incline from Thoreau street past Academy lane to Main street, which is a short distance beyond the place of accident. Distance from Thoreau street to corner of Sudbury Road and Academy lane is about 723 feet.

Geo. R. Warfield, for plaintiff.

John R. Thayer, Aurthur P. Rugg, and Henry H. Thayer, for defendant.

HAMMOND, J. The team was owned and driven by Helchier, who was sitting upon the right-hand side, while Evensen, the plaintiff's intestate, was sitting on the left-hand side. The evidence tended to show that the latter "was not feeling well," and had the collar of his overcoat turned up, and that he had intrusted himself to the care of the driver. The question, therefore, upon this branch of the case, is whether Helchier was in the exercise of due care. It would

serve no useful purpose to recite the evidence in detail. If the plaintiff's testimony is to be believed, Helchier, at several points on Academy lane, as he was approaching Sudbury Road, looked for the car. He was listening all the time, and he heard no gong or whistle, or anything else indicating the approach of a car. While at some points he could see two or three hundred feet up the track on Sudbury street, his view was wholly obstructed at others; and, as he came near the corner of the two streets and near the track, the view was much obscured by overhanging trees, both upon the lane and upon the road. Upon this, in connection with the other evidence—especially that with reference to the speed of the car and the darkness—we cannot say, as matter of law, that Helchier was not in the exercise of due care. It was a question for the jury. *Kelley v. Wakefield & Stoneham Street Railway*, 179 Mass. 542, 61 N. E. 139.

It is strongly urged by the defendant that there was no evidence of gross negligence on the part of the servants of the defendant, that there is nothing to show that the rate of speed was any greater than usual, and that the failure to sound the gong is not of itself gross negligence. There is, perhaps, no term of which it is more difficult to give a practically useful definition, or even to form a practical conception, than this term "gross negligence," as used in the statute under which this action is brought (Rev. Laws, c. 171, § 2), especially when the dividing line between that and what is called ordinary negligence is to be drawn. In some respects it is perhaps unfortunate that a right of action may be made to depend upon this dividing line. Of course, the greater includes the less, and where there is gross negligence there is always negligence. The line between due care and negligence may be stated clearly enough for the practical administration of the law, but, when one leaves the shore of due care and plunges into the sea of negligence, how far out can he go before he crosses the dividing line between what is called ordinary negligence and gross negligence? The most that can be said, perhaps, is that gross negligence is further from due care than ordinary negligence, but that is not entirely satisfactory. Still the dividing line is left undisclosed, for how far out does ordinary negligence extend? We are sensible of the danger of drawing the line too near to due care, and of finding gross negligence where only ordinary negligence exists. Each case, however, must be decided according to its peculiar features.

In this case it appeared that Academy lane and Sudbury Road were both public highways in the thickly settled residential part of the town. The evidence tended to show that a person traveling upon the lane could have only a very imperfect view up Sudbury Road; the view being entirely cut off at some points by houses, and greatly obscured at others by the overhanging trees located upon the south side of the lane

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and the west side of the road. The same obstructions, of course, would have a similar effect upon the view which a motorman on the road would have of a traveler on the lane. The night was dark, and there was evidence that no gong was sounded, and that the car was going from 10 to 12 miles an hour down the slight incline of the road; that Evensen's body was found on the track about 70 feet from the place of the collision, where it evidently had been thrown or carried by the car; and that the car stopped about 35 or 40 feet further on. In view of the situation of the two ways in a thickly settled part of the town, the amount of travel reasonably to be expected thereon, the objects which obstructed or impaired alike the view which the traveler upon the lane could get of the car and that which the motorman could get of the traveler, the darkness of the night, the speed of the car, the incline of the rails, their nearness to the west side of the road and to the trees on that side, rendering it impossible for a team coming out of the lane to avoid a collision by turning to the west of the track, and especially the very serious consequences likely to arise in case of collision with a car moving so rapidly, we cannot say, as matter of law, that the motorman was not guilty of negligence, or that the negligence was not of so high a degree as to amount to gross negligence. The question was for the jury.

Exceptions sustained.

VAN RIPER v. NEW YORK, S. & W. R. CO.

(Supreme Court of New Jersey, Nov. 12, 1904.)

[59 Atl. Rep. 26.]

Accident at Crossing—Contributory Negligence.

In an action against a railroad company for injuries caused by plaintiff's wagon being struck by one of defendant's trains on a crossing, evidence *held* to show contributory negligence.

Same—Same—Gates.*

The fact that a flagman at a crossing does not lower the gates as a person approaches the track does not relieve that person of his duty to look for an approaching train.

Action by Percy R. Van Riper against the New York, Susquehanna & Western Railroad Company. On rule to show cause. Rule made absolute.

Argued June term, 1904, before GUMMERE, C. J., and GARRISON and SWAYZE, JJ.

Collins & Corbin, for the rule.

James G. Blauvelt, opposed.

*As to whether an invitation to cross railroad tracks is implied from the fact that the crossing gates are open, and whether the traveler has a right to rely entirely upon such an invitation, see foot-note appended to *Baltimore & O. R. Co. v. Stumpf* (Md.), 9 R. R. R. 203, 32 Am. & Eng. R. Cas., N. S., 203.

GUMMERE, C. J. The plaintiff in this case sued to recover compensation for injuries received by him on an evening in December at the crossing of the defendant company's railroad and Vreeland avenue, in the city of Paterson, in a collision between one of the company's trains, running on the west-bound track, and a wagon in which the plaintiff was driving. The jury having rendered a verdict in his favor, the trial justice allowed a rule to show cause why it should not be set aside.

The plaintiff's description of the way in which the accident occurred is as follows: "I came out of Burke's saloon [which appears to have been about seventy feet from the crossing] and walked around my horses and looked down the track and up the track, and saw nothing; then I got on my truck. After getting on the truck I swung the horses straight across the street to get on the right side of the street, looking down the track and up the track, and I saw nothing. When I got on the track there was a wagon passed me on the track. I was looking up the track towards Paterson at the time. My horses were about to go on the west-bound track, and just then I glanced down the track and saw the train coming, and, on account of its being slippery, I knew I could not stop my horses, and I thought the next best thing was to get over. Just then the gateman came running down the platform and grabbed my horses and stopped them on the track, and prevented me from going any further. The train came along and struck my horses, and that is the last I know." He further stated that the gateman held his horses long enough for him to have gotten over the track twice, and that, after he (the gateman) saw that he could not do anything with them, he jumped out of the way to avoid getting hit himself. In answer to a question where the train was when he first saw it, he stated that it was just the other side of the station, at Thirty-Ninth street. It appears from an examination of the map offered in evidence that Thirty-Ninth street is 180 feet east of Vreeland avenue. He further stated that he heard no bell rung or whistle blown, and that he did not see the gateman make any attempt to lower the gates. He admits that he was familiar with the crossing, having passed over it frequently.

The following facts with relation to the surroundings at the scene of the accident appear by the undisputed testimony in the cause: A row of trees, which stood about 45 feet from the first rail of the track upon which the collision took place, somewhat obstructed the view of the plaintiff in the direction from which the train was approaching. As he drew nearer the crossing his view was also obstructed to some extent by telegraph poles; but upon reaching a point 32 feet from the first rail of the defendant's west-bound track, measured along the center line of the avenue, he had an unobstructed view down the track in that direction for a distance of more than

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half a mile, and that view continued to be entirely uninterrupted until the crossing was reached, except so far as it was interfered with by the presence of a gate maintained by the railroad company for the protection of the crossing. The train was a passenger train, the cars of which were lighted up. The headlight on the engine was burning.

It seems evident that, on the plaintiff's own story, coupled with the undisputed facts in the case, the accident which produced his injury was, at least partly, due to his own careless conduct. He says that although he looked up the tracks and down the tracks he did not observe the approaching train until the horses were upon the west-bound track, and that it was then only a block away, a distance of 180 feet, as already stated. To have reached the point where it was when the plaintiff first saw it, the train must have been in plain sight at the time when he passed the last obstruction to his view; that is, the telegraph poles. A moment's consideration will demonstrate this. The distance traveled by him, after passing that obstruction, was 32 feet, less the length of his horses. Assuming that his horses were walking (it does not appear at what gait they were traveling), and were moving not faster than a mile and a half an hour, which is much slower than a horse usually walks, and that the train was moving at the rate of 75 miles an hour, which is almost the extreme limit of speed of a passenger train, the train was moving just 50 times as rapid as the plaintiff's team, and of course covered just 50 times the distance. In other words, while the plaintiff's team was moving 30 feet, the defendant's train was moving 1,500 feet, and, consequently, was only 1,680 feet (less than one-third of a mile) from the crossing when the plaintiff reached the point where he had an entirely unobstructed view. Probably the plaintiff's team was moving less slowly, and the train less rapidly, than suggested. In either event the train would have been still nearer to the crossing at the time when the plaintiff's view in its direction ceased to be interfered with. Of course, the nearer the plaintiff approached the crossing, the nearer the train approached the same point, and the more readily it became discernible. Why, then, did the plaintiff fail to observe it until his horses were on the track and it was only 180 feet away? The answer is obvious. Either he did not look after reaching the point where looking would have been effective to warn him of the approaching danger, or else his looking was done in such a perfunctory way as to be of no avail as a means of protecting him from it. In either event he did not exercise that reasonable degree of caution which the law imposes upon a person about to cross the tracks of a railroad. And this lack of due care on his part was a contributing cause to his injury. *Penn. R. R. Co. v. Righter*, 42 N. J. Law, 180; *D., L. & W. R. R. Co. v. Hefferan*, 57 N. J. Law, 149, 30 Atl. 578; *Conkling v. Erie R. R. Co.*, 63 N. J. Law, 338, 43 Atl.

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666. Through his failure to observe the train he had placed himself in a position manifestly of great danger. His own judgment was that his best chance of escape was to endeavor to cross over in front of the advancing train. The gateman, who risked his life to prevent the happening of the accident, thought the wiser course to pursue was to attempt to back the horses off the track. It may be that either course, if not interfered with, would have been successful in preventing the collision. As it was, the resistance by each of the efforts of the other prevented either plan from succeeding. Conceding that the method attempted to be pursued by the plaintiff to escape the danger which he had incurred was the wiser one, and that the attempt of the gateman to back the horses from the track was ill advised, the fact still remains that the presence of the plaintiff upon the track was the original producing cause of the accident, and was due to his negligence in not observing the nearness of the defendant's train.

It is urged that, even if the plaintiff did not look for an approaching train as he proceeded towards the crossing, his failure to do so was not carelessness on his part, because the failure of the gateman to lower the gates which protected the crossing justified him in assuming that no train was near. A similar contention was urged in the case of *Swanson v. Central R. R. Co.*, 63 N. J. Law, 605, 44 Atl. 852, but it was there held that the failure of a flagman or gateman to perform the duty which his position required, like the failure of an engineer to blow his whistle, or of a fireman to ring his bell, does not absolve the passenger on the highway from the use of independent observation for his own protection, and that, notwithstanding that such nonaction on the part of the railroad company's employee is, in effect, a declaration that the way is clear, the failure of the traveler on the highway to make independent observation is ordinarily a failure to exercise that reasonable degree of prudence which the law requires of all persons approaching these known places of danger. The same principle underlies the decision in *Conkling v. Erie R. R. Co.*, supra.

The rule to show cause should be made absolute.

BIRMINGHAM RY., LIGHT & POWER CO. v. OLDHAM.

(Supreme Court of Alabama, July 21, 1904.)

[37 So. Rep. 452.]

Accident at Street Railway Crossing—Mutual Rights and Duties.*

At street crossings pedestrians and operators of street cars have equal rights of passage, but each is presumed to know of the danger incident to the crossing by the former of the car tracks, and upon each is incum-

*See foot-note appended to *Louisville Ry. Co. v. Colston* (Ky.), 12 R. R. R. 668, 35 Am. & Eng. R. Cas., N. S., 668.

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bent the duty of exercising such care to avoid injury as a reasonably prudent person would use under the circumstances.

Same—Look and Listen—Negligence and Contributory Negligence.†

It is the duty of a pedestrian, before crossing tracks on which street cars are being operated, to look and listen for approaching cars, from which he is not absolved by the fact that a car had but recently passed; and where he could have seen an approaching car by which he was struck and injured, but failed to look, he is chargeable with contributory negligence which precludes his recovery for the injury, notwithstanding the negligence of those operating the car, unless their negligence was willful or wanton.

Same—Failure to Look—Effect of Rule to Prevent Collisions between Cars—Signals.‡

Where plaintiff, upon alighting from a street car at a street crossing, passed around behind it, and upon a parallel track, without looking to see whether there was a car approaching thereon, and was struck and injured by a car going in the opposite direction, the question of his contributory negligence is not affected by the fact that the rules of the company required the car to stop on meeting another, which had stopped to take on or discharge passengers, and also to sound the bell at crossings, which was not done; it not appearing that such rules were customarily observed, or that plaintiff relied upon or knew of them.

Appeal from City Court of Birmingham; W. W. Wilkerson, Judge.

Action by John S. Oldham against the Birmingham Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Reversed.

This action was brought to recover damages for personal injuries sustained by the plaintiff. The complaint contains eight counts. The first, fourth, fifth, and sixth counts charge the defendant with simple negligence, while the third, seventh, and eighth counts charge the defendant with willfulness or wantonness. The defendant pleaded the general issue and several special pleas, setting up contributory negligence of the plaintiff. The court sustained a demurrer to the pleas of contributory negligence in so far as they purported to be an answer to the counts of the complaint charging wantonness and willfulness. The facts of the case are sufficiently stated in the opinion. The defendant requested, among other charges, the general affirmative charges in its behalf, and separately excepted to its refusal to give said charges as asked. There were verdict and judgment for plaintiff assessing his damages at \$5,000. The defendant appeals, and assigns as error the several rulings of the court to which exceptions were reserved.

†As to the duty to stop, look, and listen before crossing street railway tracks, see foot-note appended to *Itzkowitz v. Boston Elevated Ry. Co. (Mass.)*, 12 R. R. R. 583, 35 Am. & Eng. R. Cas., N. S., 583, where all the preceding authorities in this series are collected or referred to.

‡As to the combined effect of contributory negligence and failure to give crossing signals, see foot-note appended to *West v. Northern Pac. Ry. Co. (N. Dak.)*, 12 R. R. R. 655, 35 Am. & Eng. R. Cas., N. S., 655, where all preceding authorities in this series are collected or referred to.

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Walker, Tillman, Campbell & Walker, for appellant.
Banks & Selheimer, for appellee.

SHARPE, J. In this suit recovery is sought for injuries resulting to the plaintiff from his being run against by a street car operated by defendant on Eighth avenue, in the city of Birmingham. Where the accident occurred there were two car tracks about six feet apart running parallel with each other eastward and westward. The cars were moved by electricity. Plaintiff had ridden westward along the north track, and having, in going from Sixteenth to Fifteenth street, passed an east-bound car, he, near the west line of Fifteenth street, stepped from the north side of his car, walked around behind it, and, as it was moving away, was about to go upon the south track, when he was struck and injured by a car going eastward on that track. On these lines there were in force at the time of the accident the following rules: "When a car has stopped on double track or a siding to let passengers on or off, cars approaching in the opposite direction must stop. Passengers are liable to get off the car and walk across the other track in front of car approaching in opposite direction." "Ring the alarm bell approaching and going around curves and before crossing street, and to signal wagons and other vehicles to clear the track." Respecting plaintiff's conduct on that occasion, the evidence is undisputed, and, as appearing from his own testimony, it shows that plaintiff did not, after alighting from his car, make any effort by looking, listening, or otherwise to ascertain whether he could go upon the south track with safety. In testifying he said, among other things: "I paid no attention to whether a car was coming from the direction of my right or not. I did not look to the right or left either. I didn't know how the cars moved on those tracks. I wasn't acquainted with the cars. I hadn't paid any attention to whether cars moving on parallel tracks went away to the right at that time. I do not know it now. I did not know how they ran. I did not heed that at all." At street crossings pedestrians and street car operators have equal rights of passage, but each of them is presumed to know of the danger incident to the crossing by the former of tracks whereon cars are operated, and upon each is incumbent the duty of exercising such care for the avoidance of injury as a reasonably prudent person would use under the circumstances. In Booth on Street Railways, § 312, it is well said: "It is manifestly dangerous for a pedestrian about to cross a street railway to omit to use his senses before stepping upon the track to ascertain whether a car is approaching, unless he can rely upon some well-known custom or regulation at crossings which renders such precaution unnecessary. * * * The doctrine which seems to be supported by authority and reason is that it is presumptively negligent on the part of the pedes-

trian to attempt to cross the track without looking or listening, when, if he had looked and listened, he could have discovered the approach of the car in ample time to avoid injury." In *Nellis on Surface Railroads*, p. 365 et seq., it is said with reference to the act of crossing street railways that "there is always the duty to look for an approaching car, and, if the street is obstructed, to listen, and in some situations to stop, and a plaintiff must be held to have seen that which was obvious. A diversion of attention, generally speaking, will not excuse the performance of this duty; neither will misconduct on the part of the railway company." In 27 *Am. & Eng. Ency. Law*, pp. 81, 82, after reference made to authorities between which there is some lack of harmony, it is stated that: "The general rule undoubtedly is that it is the duty of the pedestrian to look and listen for approaching cars before crossing street railway tracks; and the rule has been applied when a person alighting from a car on one track crossed an adjoining track without looking," etc.

In the circumstances attending this accident there was nothing to absolve the plaintiff from the duty of looking to see that the south track was clear. The car from which he alighted had before the accident gone from between him and the approaching car, and the passing of another east-bound car several hundred feet ahead of the one that struck plaintiff did not justify him in assuming the track would be clear when he attempted to cross it. To what extent he might have relied upon a custom of defendant to stop its cars where other cars were discharging passengers, or to signal before running upon a crossing, is not in question, for there is no evidence to show that the rules upon those subjects was customarily observed, or that plaintiff acted in reliance upon, or even with knowledge of, them. Those rules were apparently to enjoin caution upon those operating cars, and their mere existence did not abate the caution which, in their absence, would have been enjoined by common prudence upon other persons.

The evidence leads to the certain conclusion that in heedlessly placing himself in the path of the car that struck him plaintiff was so lacking in the observance of due care as to make him, in a legal sense, guilty of negligence, and that such negligent conduct on his part contributed proximately to his injury. Therefore the charges requested by defendant which negative the right of recovery under counts of the complaint based on mere negligence of defendant should have been given.

In the record there is evidence tending to show the car that injured plaintiff was at the time of the accident being run at a speed of from 15 to 20 miles per hour; that no signal was given of the approach to Fifteenth street crossing, and no effort was made to warn plaintiff of its approach, or to check the car, before he was stricken. From this phase of

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the evidence inferences might have been drawn in support of counts in the complaint which attribute the injury to willfulness, wantonness, or intention. This, however, is opposed by other evidence, which, if true, should prevent recovery under the last-mentioned counts. To here state reasons favoring either of such results might unduly influence another trial, and such statement will therefore be pretermitted. What has been said disposes of the questions argued in briefs. Assignments of error not insisted on are treated as waived. Reversed and remanded.

FOWBEL, *v.* WABASH R. CO.

(Supreme Court of Iowa, Oct. 19, 1904.)

[100 N. W. Rep. 1121.]

Railroads—Private Crossing—Gates—Killing Stock.*

Where three parallel lines of railroad run through a farm, and a private crossing passed over all three, and gates had been erected between each track, and the two inner gates were removed by the owner of the land, leaving a gate on each side of the right of way, and a cow of a third person wandered on the track at such crossing, the railroad on whose track the cow was thereafter killed was not liable for failure to maintain a gate between its track and the middle track.

Appeal from District Court, Monroe County; F. W. Eichelberger, Judge.

Action for damages caused by a collision of plaintiff's cow with defendant's engine. The trial resulted in a judgment against defendant, from which it appeals. Reversed.

T. B. Perry, for appellant.

Dashiell & Mason, for appellee.

LADD, J. The plaintiff's cow was being kept by A. A. Mason, whose farm lies immediately south of Albia. Through one 40-acre tract three railroads pass. These are parallel, with rights of way adjoining, running north and south. East

*For authorities in this series on the subject of the duties and liabilities of railroad companies with respect to gates at private crossings, see extensive note appended to *Mobile & O. R. Co. v. Tiernan* (Tenn.), 15 Am. & Eng. R. Cas., N. S., 564; *Mooers v. Northern Pac. Ry. Co.* (Minn.), 17 Am. & Eng. R. Cas., N. S., 753; *Swanson v. Chicago, M. & St. P. Ry. Co.* (Minn.), 17 Am. & Eng. R. Cas., N. S., 753 (duty to close gates); *Kavanaugh v. Atchison, T. & S. F. Ry. Co.* (Mo.), 21 Am. & Eng. R. Cas., N. S., 755 (gate left open by unknown person without actual or imputable knowledge or notice of company); *Wirstlin v. Chicago, etc., Ry. Co.* (Iowa), 11 R. R. R. 570, 34 Am. & Eng. R. Cas., N. S., 570 (degree of care required in constructing; and duty to repair as affected by notice or want of notice; and notice of defect may be inferred from lapse of time); *Atkinson v. Chicago, etc., Ry. Co.* (Wis.), 9 R. R. R. 423, 32 Am. & Eng. R. Cas., N. S., 423 (railroad liable for killing horse, which, after escaping from owner's sufficiently fenced pasture, reached track through gate in fence along adjoining land of third person, and negligently left open by third person).

of these, and between them and the highway, are the land owner's buildings and feed lots. Leading from the lots to the west is a lane and private crossing over the three tracks and rights of way. Through this lane and another along the west right of way to the south he necessarily drove his cattle and other stock to and from his pasture. The west right of way, with track, was that of the Iowa Central Railway Company; the one between, that of the Albia & Centerville Railroad Company; and that to the east belonged to the defendant. The company first mentioned constructed gates on each side of its crossing, and the Albia & Centerville Railroad Company on the east side of its right of way. Many years ago the west gate becoming dilapidated, the Iowa Central Railroad Company replaced it with the one between its right of way and that of the Albia & Centerville Railroad Company. The defendant put in a gate at the crossing on the east side of its right of way. About a year later Mason removed the gate from between the right of way of the defendant and that of the Albia & Centerville Railroad Company. Even though it belonged to him, the defendant must have known long before the accident that it had been removed. Enough has been said to show that at that time the only gateways were at the west side of the west right of way and at the east side of the east right of way. The cow was struck by defendant's train, and the circumstances were such as to render it liable if it ought to have maintained a gate at the private crossing between its right of way and that of the Albia & Centerville Road. No doubt the defendant was bound to maintain an adequate crossing. But precisely what that is the statute does not declare. That the situation may be such as to exact an open crossing has been recognized by this court. *Gray v. Ry.*, 37 Iowa, 119. There the road passed between the landowner's house and the public highway; but this was not declared to be the only condition under which an open crossing may be appropriate. The open crossing for connecting different parts of a pasture was discountenance in *Truesdale v. Jensen*, 91 Iowa, 312, 59 N. W. 47, and *Curtis v. Ry.*, 62 Iowa, 418, 17 N. W. 591. Ordinarily, protection should be afforded by gates or bars forming a part of the fence in closing the right of way. *Henderson v. Ry.*, 39 Iowa, 220; *Mackie v. Ry.*, 54 Iowa, 540, 6 N. W. 723; *McKinley v. Ry.*, 47 Iowa, 76. But none of these authorities attempt to lay down a fast and hard rule. The object to be attained in maintaining the gates or bars must be kept in view. Aside from the convenience of the landowner and the protection of his stock, the safety of the traveling public is to be taken into consideration. *Russell v. Hanley*, 20 Iowa, 224, 89 Am. Dec. 535. If a gate will serve no useful purpose in either respect, and at the same time will prove an obstruction in the use of the crossing, there can be no excuse for its existence. Whether gates shall be

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maintained necessarily depends on the situation in each particular case. In *Tyson v. Ry.*, 43 Iowa, 207, the owner was maintaining a lane closed by a gate at his house and another at the public road. The railroad crossed this lane, but there were no gates at the crossing. The court held that: "The lane fences and gates might be regarded as constituting a part of the railroad fence merely set out upon the landowner's premises, and maintained by him for his accommodation. These fences and gates constituted as effectual a barrier against cattle not admitted to the lane as they would have done if they had been on the line of the road. While the plaintiff was maintaining the fences and gates apparently for the purpose of enjoying an open crossing, we think the company was justified in assuming that he preferred an open crossing. It was not for him to complain, therefore, that his cow strayed upon the track." Mason's lane across the rights of way was 300 feet long. Its only use was as a causeway for the passage of cattle and other stock. The gates at the ends of the lane could not well have been dispensed with, but any intervening gates would have interfered with, rather than aided, in the passage of the stock, and increased, rather than lessened, the danger of collision with trains. The gates between the rights of way of the other two roads had been removed many years previously, and Mason testified that after the construction of the defendant's line the gate between its right of way and that of the Albia & Centerville Road was never closed, and that, as it belonged to him, he had removed it long before the accident. As he had never made use of the gate, and voluntarily removed it, and, in so far as the record discloses, had never requested that it be replaced by another, and as the use of the crossing, as it was, was necessarily more convenient and not more dangerous, it may well be inferred that the crossings were as he wished them. At any rate, it was practically one crossing over three roads, and the evidence failed to show that it was not adequate for the purposes of the landowner, and protected by fence, in so far as essential to his use and convenience and the safety of the public.

Reversed.

CENTRAL OF GEORGIA RY. CO. v. WILLIAMS BUGGY CO.

(Supreme Court of Georgia, Nov. 12, 1904.)

[48 S. E. Rep. 939.]

Accidents on Track—Negligence—Speed.*

Relatively to persons or property on the track of a railroad company, where there is no public crossing, and where the company is not bound

*As to the care due licensees and trespassers on railroad tracks at places other than crossings, see foot-note appended to *Hortensine v. Virginia-Carolina Ry. Co.* (Va.), 12 R. R. R. 616, 35 Am. & Eng. R. Cas., N. S., 616; foot-note appended to *Gregory v. Louisville & N. R. Co.* (Ky.), 12 R. R. R. 293, 35 Am. & Eng. R. Cas., N. S., 293.

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to anticipate their presence, it is not negligence for the company to run its trains at a speed of 50 or 60 miles an hour.

Killing Stock—Presumption of Negligence—Rebuttal.†

Under the undisputed evidence the defendant fully rebutted the presumption of negligence arising against it from proof of the killing of the stock, and the trial judge erred in refusing to grant a new trial. *Georgia M. & G. R. Co. v. Harris*, 9 S. E. 786, 83 Ga. 393; *Georgia Southern & F. Ry. Co. v. Sanders*, 36 S. E. 458, 111 Ga. 128.

(Syllabus by the court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the Williams Buggy Company against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hall & Wimberly, for plaintiff in error.

Claud Estes, for defendant in error.

SIMMONS, C. J. Judgment reversed. All the Justices concur.

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(Supreme Court of Rhode Island, Sept. 21, 1904.)

[59 Atl. Rep. 105.]

Accident on Track—Negligence—Speed in the Country.‡

The operation of an electric car in the country at such a rate of speed that the motorman was unable to stop it in time to avoid injury after the headlight revealed plaintiff's intestate crawling towards the car on his hands and knees between the rails, was not negligence.

Same—Contributory Negligence.

Where plaintiff's intestate was struck and killed by defendant's street car while he was crawling towards the car on his hands and knees between the rails at a point where the car was visible at a distance of 800 feet, his contributory negligence was a bar to recovery.

Contributory Negligence—Intoxication.§

Intoxication does not relieve a man from the degree of care required of a sober man in the same circumstances.

†See extensive note appended to *Macon & B. R. Co. v. Revis* (Ga.), 12 R. R. R. 787, 35 Am. & Eng. R. Cas., N. S., 787; *Western & A. R. Co. v. Robinson* (Ga.), 12 R. R. R. 821, 35 Am. & Eng. R. Cas., N. S., 821.

‡As to whether any rate of speed at country crossing may constitute negligence on the part of a railroad, see foot-note appended to *Custer v. Baltimore & O. R. Co.* (Pa.), 9 R. R. R. 448, 32 Am. & Eng. R. Cas., N. S., 448; *Reed v. Queen Anne's R. Co.* (Del.), 11 R. R. R. 332, 34 Am. & Eng. R. Cas., N. S., 332.

§See *Mercer v. Southern Ry.* (S. Car.), 8 R. R. R. 703, 31 Am. & Eng. R. Cas., N. S., 703; notes, 7 Am. & Eng. R. Cas., N. S., 122; 9 Am. & Eng. R. Cas., N. S., 264; 11 Am. & Eng. R. Cas., N. S., 834; 13 Am. & Eng. R. Cas., N. S. 689; *Price v. Philadelphia, W. & B. R. Co.* (Md.), 7 Am. & Eng. R. Cas., N. S., 115; *Kingston v. Ft. Wayne & E. Ry. Co.* (Mich.), 9 Am. & Eng. R. Cas., N. S., 259; *Eidson v. Southern Ry. Co.* (Miss.), 11 Am. & Eng. R. Cas., N. S., 832; *St. Louis, I. M. & S. Ry. Co. v. Jordan* (Ark.), 13 Am. & Eng. R. Cas., N. S., 681; *Missouri, etc., R. Co. v. McGlamory* (Tex.), 5 Am. & Eng. R. Cas., N. S., 696; *Trumbull v. Erickson* (C. C. A.), 17 Am. & Eng. R. Cas., N. S.,

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Action by Maria Vizacchero against the Rhode Island Company. On petition of defendant for new trial. Judgment for defendant.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Livingston Ham and Lewis S. Thompson, for plaintiff.
Henry W. Hayes, Frank T. Easton, and Lefferts S. Hoffman, for defendant.

DOUGLAS, J. This action is brought to recover damages for the death of the plaintiff's intestate, who was struck and mortally wounded by one of the defendant's electric trolley cars, which was coming towards the city, in the town of Johnson, about 8 o'clock, p. m., March 8, 1903. The place where the accident occurred was on Atwood avenue, a thinly settled country road 50 feet wide, having the car track located along one side, next to the sidewalk, leaving about 30 feet of unoccupied highway. The evening was dark and stormy, and the headlight and other lights of the car were lighted, and a person on the track approaching the place of the accident, and facing towards the car, had an uninterrupted view for at least 80 feet. The headlight enabled the motorman to distinguish objects upon the track within a distance of about 25 feet. A witness, who, with his wife and child, were the only passengers on the car, testifies that the car at the time of the accident was going, as he thinks, at the rate of 20 miles an hour. In cross-examination he admits that he could not see through the windows, which were obscured by the weather; that his attention was taken up by the child, with whom he was playing; and that his estimate of the speed of the car was merely a guess. The motorman and conductor testify that the car was going at the rate of from 9 to 12 miles an hour, as was customary at that place. The motorman testifies that, looking carefully ahead, he first saw the intestate on his hands and knees, upon the track, facing the car, about 25 feet away; that he immediately applied his brake and reversed the power, but, notwithstanding these efforts, which were all that he could make, the car struck the man, threw him to one side of the track, and stopped about 20 feet further on. It appeared from the evidence of the physicians who examined the plaintiff's intestate at the hospital that he had been drinking spirituous liquor, but there is no direct evidence that he was intoxicated. He had been seen, shortly before the accident, walking in his usual manner on the road. Jury trial having been waived, the case was tried before a single judge in this division, who decided that, while the plaintiff's intestate was negligent in approaching the car as he did, the defendant's

93; *Louisville & N. R. Co. v. Cummins* (Ky.), 21 Am. & Eng. R. Cas., N. S., 774; *Hord v. Southern Ry. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 756.

servant was negligent in running the car so rapidly that, with the appliances at his command, he could not stop the car after the man was distinguishable by the headlight. And his conclusion was that the negligence of the defendant was the proximate cause of the accident. He therefore decided in favor of the plaintiff, and assessed the damages at \$5,000.

We think the learned judge erred in his finding that the defendant's servant was guilty of neglect of duty, and also in finding that the intestate's negligence was not the proximate cause of the accident. The duty of the driver of an electric car passing along a sparsely settled country road in the space between intersecting roads is not to be judged by the same rules with regard to speed which apply to the same car passing along the crowded street of a city. The care to be exercised is relative, and must be proportional to the danger reasonably to be apprehended at the time and place. *Stelk v. McNulta*, 99 Fed. 138, 40 C. C. A. 357. The popular demand for electric cars rather than horse cars or omnibuses prevails at the present day because the former can carry more passengers, and at a more rapid rate, than the latter. In order to serve the public, these cars must be propelled as rapidly as safety will permit; and on long stretches of country road, where the statutes and town ordinances fix no limit to their speed, no given rate of speed is per se excessive. *Kline v. Traction Co.*, 181 Pa. 276, 37 Atl. 522. The duty of a traveler upon an unimpeded country road is to yield the use of the railroad track to an approaching car. The willful and malicious obstruction of a street railway company in the use of its tracks is punishable as a misdemeanor. Gen. Laws 1896, c. 279, § 65. The car cannot turn out, and so the traveler must. The conduct of the operator of the car may be lawfully predicated upon the expectation that the traveler will observe his duty in that regard.

The duty of the railroad company towards such travelers is not to stop his car when they appear, but give them sufficient notice of the approach of the car to enable them to leave the track before the car arrives. *Terre Haute R. Co. v. Graham*, 46 Ind. 239-245; *W. Chicago St. Ry. Co. v. Schwartz*, 93 Ill. App. 387; *McQuade v. Met. St. Ry. Co.*, 17 Misc. Rep. 154, 39 N. Y. Sup. 335. If the car is going only at such speed as will give a traveler ample time to leave the track, after he sees the light or hears the signal of the car, before the car reaches him, he has nothing to complain of. It is not running at excessive speed with regard to him. *Bethel v. Cinn. St. Ry. Co.*, 15 Ohio Cir. Ct. R. 381, 8 Ohio C. D. 310. It is therefore plain that the distance at which the light of the car can be seen or the bell or whistle can be heard and understood by travelers, so as to enable them conveniently to leave the track—not the distance that the motorman can see ahead—is the standard by which the

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speed of the car should be regulated. As it is not the duty of the car to stop within the limit of the illumination of the headlight, its speed need not be restricted to the rate prescribed by such a necessity. Such a general rule as that which the court announced is neither necessary nor reasonable as applied to the locality in question.

In the particular circumstances of this case we are unable to see that the defendant's servant was guilty of any negligence. Negligence is the failure to provide for some condition or event which may reasonably be expected, and the motorman in this case, in the place where he was going, had no reason to expect that any pedestrian would remain upon the track after the lights of the car were plainly visible. Certainly he had no reason to anticipate that he would encounter a human being upon the track, crawling towards the car upon his hands and knees, and it was not his duty to run his car so as to provide for such a contingency. After the man was seen, it is not suggested that the motorman was guilty of negligence, as he used every means in his power to stop the car before the collision. *Stelk v. McNulta*, 99 Fed. 138, 40 C. C. A. 357; *Murray v. Forty-Second St. Ry. Co.* (Sup.) 41 N. Y. Supp. 620. It may be added, also, that there is no evidence that upon the wet and slippery track the car could have been stopped in time if it had been proceeding at a very moderate rate of speed.

Again, the court erred in holding that the plaintiff could recover notwithstanding his own negligence. The doctrine of proximate cause, sustained by a long series of decisions following *Davies v. Mann*, 10 M. & W. 546, as we have adopted it in this state, is clearly stated in *Mahogany v. Ward*, 16 R. I. 479, 17 Atl. 860, 27 Am. St. Rep. 753, and *Prue v. R. R. Co.*, 18 R. I. 360, 27 Atl. 450. The plaintiff's counsel cites many cases in support of his contention that this case is governed by the rule. Some of the cases cited make, as it seems to us, quite unwarranted applications of it, to the extent almost of making a railroad company responsible for damages to the heirs of a suicide; but none go so far as would be necessary to absolve the plaintiff from contributory negligence in this case. Taking the words of Baron Parke in *Davies v. Mann*, "the negligence which is to preclude a plaintiff from recovering in an action of this nature must be such that he could by ordinary care have avoided the consequence of the defendant's negligence," as a guide, it is plain that the plaintiff cannot recover; for her intestate, by ordinary care, could have avoided the car, which was visible at a distance of 800 feet, no matter how fast it was going. It was just as much the duty of the plaintiff's intestate to avoid the consequences of the defendant's negligence, if there was any, as for the defendant's servant to avoid the consequences of the intestate's negligence, if by any care and foresight he could have done

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so. The intestate's negligence was not remote in point of time, but continuous and coefficient with the act of the company. The court says, in *O'Brien v. McGlinchy*, 68 Me. 552, 558: "But this principle would not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them." In *Isbell v. N. Y. & N. H. R. Co.*, 27 Conn. 393, 71 Am. Dec. 78, it is said: "The negligence of the plaintiff, if there has been any, was not the proximate cause of the accident. To be so, it must have been simultaneous in its operation with that of the defendant, of the same kind, immediately growing out of the same transaction, and not something distinct and independent of a prior date, remotely related to the negligence of the defendant. In the case of *Prue v. R. R. Co.*, 18 R. I. 360, 27 Atl. 450, the victim was proceeding to extricate himself from the danger, and could have escaped but for the independent mistaken act of the gateman after he saw the position of the traveler. If the traveler had remained upon the track, with the gates open, the case must have been decided differently. In one of the most reliable textbooks on the subject of negligence, the rule, as formulated by a writer in the *Quarterly Law Review*, vol. 2, p. 507, is adopted as follows: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible." 1 S. & R. Neg. 165, § 99. The negligence of the plaintiff's intestate did not consist in walking upon the track, which he had a right to do until the car approached, but in remaining upon it after the car was plainly visible; and this negligence continued until the car struck him. The opportunity for him to escape began when he could have seen the car 800 feet away, and only ended a few seconds before he was struck. His neglect of this opportunity, as much as the approaching car, caused the accident. In *Randall v. Union R. R.* (Ex. No. 2,356, April 6, 1898) 58 Atl.—, we held that a nonsuit was properly granted where it appeared that the accident was caused by the failure of the plaintiff seasonably to turn off of the track after the car had reached a point where it could have been seen, or by the slipping of the horse on the hard snow. It has been held that a person riding between the rails of an electric street railway upon a bicycle has the duty to look out for and endeavor to avoid danger from the electric cars, and the negligence of a bicycle rider who continued to ride on the track of an electric car up to the very moment when he was struck, when, by the slightest care and effort on his part, he could have put himself out of danger up to the last moment, is a contributing and efficient cause of the injury which precludes the conclusion that the negligence in managing the car was later in time, and therefore the proximate cause of injury. *Everett v. Los Angeles Consol. Elec. R. Co.*, 115 Cal. 105, 127, 43 Pac. 207,

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46 Pac. 889, 34 L. R. A. 350. The duty of a pedestrian is the same, and his opportunity is as great; and so it is clear that the contributory negligence of the plaintiff's intestate was a proximate cause of his death. In *Crmsbee v. B. & P. R. R. Co.*, 14 R. I. 104, 51 Am. Rep. 354, it was held to be contributory negligence on the part of a deaf mute to cross a railroad track without looking for an approaching train, and that his administratrix could not recover, though the train gave no signal as it should have done.

A very instructive case, though not presenting the same facts affecting the question of the defendant's negligence as the case at bar, is *State v. United Rys. & Elec. Co. of Baltimore (Md.)* 54 Atl. 612, 613. The care required of one who attempts to cross the track of an electric road in the open country is strongly insisted upon. The case is directly in point on the question of contributory negligence. The court say: "It is evident from all the evidence that we have here * * * a rapidly approaching car in the sight of the traveler, who, in spite of the fact that he saw it, drove leisurely on the track, and was run over and killed. It is conceded, of course, that the defendant was negligent in failing, perhaps, to give signals, and in running at a higher rate of speed than was allowable; but under all the authorities such negligence of the defendant does not palliate or excuse the negligence of the plaintiff"—citing *Keenan v. Union Traction Co.*, 202 Pa. 107, 51 Atl. 742, 58 L. R. A. 217. So in *Gilmore v. Passenger Ry.*, 153 Pa. 31, 25 Atl. 651, 34 Am. St. Rep. 682, it was held that: "A person is guilty of contributory negligence who leaves a horse and wagon unguarded upon the track of an electric street railway, in a narrow and unlighted alley, on a dark night; and he cannot recover for injuries to the horse and wagon, although the railway company was also negligent in running the car at a rate of speed that did not permit its stoppage within the distance covered by its own headlight." The court say: "It is an unbending rule, to be observed at all times and under all circumstances, that a person about to cross the track of a street railway must look in both directions for an approaching car before attempting to cross. *Ehrisman v. East Harrisburg Passenger Ry. Co.*, 150 Pa. 180, 24 Atl. 596, 17 L. R. A. 448; *Wheelahan v. Phila. Trac. Co.*, 150 Pa. 187, 24 Atl. 688. But compliance with this rule would be an idle ceremony if a person might afterwards stop his horse or vehicle upon the track, relax his vigilance, and, leaving his horse unguarded, go into a building in the vicinity, and there remain any length of time whatever." And the judgment for the plaintiff was accordingly reversed. See, also, to the same effect, *N. Y. Condensed Milk Co. v. Nassau Elec. Co. (Sup.)* 60 N. Y. Supp. 234.

If the plaintiff's intestate had impaired his ability to take care of himself by getting intoxicated, that fact in no wise

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affects the case. Intoxication does not relieve a man from the degree of care required of a sober man in the same circumstances. *Chicago City Ry. v. Lewis*, 5 Ill. App. 242; *Bageard v. Consolidated Traction Co.*, 64 N. J. Law, 316, 45 Atl. 620, 49 L. R. A. 424, 81 Am. St. Rep. 498. In *Bugbee v. Union R. R. Co.* (Ex. No. 3,348, April 8, 1904) 58 Atl.—, the plaintiff was walking upon the track, intoxicated, when he was struck by an electric car, and the court considered him culpably negligent.

As the record presents all the evidence attainable, and it conclusively appears that the plaintiff's intestate had no cause of action against the defendant, judgment will be entered for the defendant.

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(Supreme Court of Michigan, Nov. 15, 1904.)

[101 N. W. Rep. 264.]

Witnesses.

Where a witness subsequently gave the evidence sought to be obtained by a question which was disallowed, the sustaining of the objection was harmless error.

Appeal.

Where the court sustained an objection to a question asked of a witness on cross-examination, and stated that the question was improper, and defendant's counsel thereafter made no request to have the matter referred to by the court in its charge, he was not entitled to predicate error thereon.

Killing Cattle—Argument of Counsel—Absence of Witnesses.*

Where, in an action against a street railway company for killing one of plaintiff's cows, the record showed that the car which struck the cow had a conductor, and was carrying upwards of fifty passengers, and there was no effort to obtain the attendance of the conductor or more than one of the passengers, and their absence was not accounted for, defendant's counsel having severely criticized one of plaintiff's witnesses, it was not error for plaintiff's counsel in his argument to refer to the absence of the conductor and the other passengers, and to draw an inference therefrom that their testimony, if produced, would be adverse to defendant.

Duty to Look Out for Stock.†

In an action against a street railway company for killing plaintiff's cow, an instruction that plaintiff could only recover if the killing was willful and reckless, and that unless defendant, when it saw the cow on the track, or had good reason to believe it would go on the track, did nothing to prevent running against the cow, the jury could not find for plaintiff, was not prejudicial to defendant.

Direction of Verdict.

In an action against a street railway company for the killing of plaintiff's cow, evidence held to require the denial of a motion to direct a verdict for defendant.

*See extensive note appended to *Macon & B. R. Co. v. Revis* (Ga.), 12 R. R. R. 787, 35 Am. & Eng. R. Cas., N. S., 787.

†See extensive note appended to *Davis v. Southern Ry. Co.* (S. Car.), 12 R. R. R. 188, 35 Am. & Eng. R. Cas., N. S., 188.

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Error to Circuit Court, Houghton County; Albert T. Streeter, Judge.

Action by Charles Airikainen against the Houghton County Street Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Gray, Haire & Stone, for appellant.

W. A. Burritt, for appellee.

MOORE, C. J. In August, 1902, a cow belonging to plaintiff, which he allowed to run at large, was killed while on the track near a crossing, by a car belonging to the defendant. From a judgment in favor of the plaintiff the case is brought here by writ of error.

Counsel for appellant say the questions involved are: (1) Whether the court erred in refusing to permit the witness Davey to testify whether, in his judgment, the cow could have got across the track before the car struck it if it had not suddenly stopped. (2) Whether the following question, put by plaintiff's counsel to the witness Wint, was not improper, and prejudicial to defendant, viz.: "You are the man that was running the car at the time Mr. Boivine was injured?" (3) Whether the remarks of plaintiff's counsel to the jury, suggesting that, if the defendant had put the conductor and the fifty-seven passengers on the car upon the stand, they would have testified against defendant, were not improper, and prejudicial to the defendant. (4) Whether the court erred in refusing to instruct the jury as requested by defendant in its third request to charge. (5) Whether the court erred in instructing the jury upon the question of what constitutes gross negligence. (6) Whether the court erred in refusing to direct the jury to find a verdict for the defendant as requested by its fourth request to charge. (7) Whether the court erred in overruling and not granting defendant's motion for a new trial for the foregoing reasons, and because the verdict of the jury was against the weight of evidence. We will consider these questions in the order presented by counsel.

1. Mr. Davey was a passenger. He testified to seeing the cows, and the distance the cows were from the car, and what they did. He was then asked: Q. "When you saw her step upon the track, did you think she would clear the track before the car reached her?" Upon objection the question was excluded. We do not need to decide whether this was error, because almost immediately, upon the cross-examination, he stated: "I did not see it [the cow] stop, but it was on the track the last time I saw it. I thought it was going to get across, and was surprised that the collision occurred." It will be observed the defendant obtained the opinion of the witness as fully as though the question of counsel had been answered, and the error, if it was one, was not reversible error.

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2. The record shows in relation to this assignment of error as follows: Mr. Wint was the motorman. At the commencement of his cross-examination the following occurred: "Q. You are the man that was running the car at the time Mr. Boivine was injured? Mr. Gray: If your honor please, I have been anticipating something of that kind. I think it is entirely improper. No reference should be made to any prior accident. It certainly will tend to prejudice the jury. The Court: I think that is so, Mr. Burritt. It does not seem to me to be necessary to go into the facts of other accidents. You cannot prove negligence in this accident by other accidents. Mr. Burritt: That is not the purpose. It is only to refresh the witness' memory." This occurrence was one of the reasons assigned on the motion for a new trial. In disposing of the motion the trial judge said: "In the brief counsel urges: 'True, the court held that the question was improper, but in a very mild way, and we do not think it can be said that the impression produced (and, we say, deliberately and intentionally produced) on the minds of the jury was removed by the court's remarks.' I can hardly agree with counsel. An explanation was made, although it does not appear in the record, which would do away entirely with any question of deliberate intention on the part of the counsel in asking the question. Nor does it seem to me a very mild way in which the court held the question improper. Mr. Gray did not simply object to the question. With force he characterizes it as entirely improper, and designed to prejudice the jury; and, while making no formal objection, his remarks were adopted and enforced by the court in the first sentence, 'I think that is so, Mr. Burritt,' including everything that has been said by Mr. Gray with regard to the question. At the time that seemed to be all that was necessary, even supposing the question had been one deliberately introduced in the case by the attorney. If it were not enough in the mind of the objecting counsel, he could have requested reference to it in the charge." The question was an improper one. The court so told the jury, and apparently judge and counsel alike thought all had been said that was necessary. If cases are to be reversed because of the situation shown here, it would be necessary to reverse nearly every hotly contested case.

3. This is based on the following: During the argument of counsel for plaintiff to the jury the following proceedings were had: "Mr. Burritt: Where is the conductor that was on that car? Mr. Gray: I object to that, your honor. Mr. Burritt: I was saying, gentlemen of the jury, that they say that this lady, our witness, is the star actor. The motorman has testified. Where is the conductor who was running this car, and who had charge of it? Why don't they bring him here? Mr. Gray: To that we object, your honor, as entirely improper. The Court: I think that counsel has

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a right to comment on witnesses that were not produced. That were on the car. Mr. Gray: I take an exception. Mr. Burritt: I say, gentlemen of the jury, where are the fifty passengers? The testimony is that there were fifty passengers on the car. We have only one of these passengers here. Mr. Gray: We object to that statement for the same reason, and take an exception. Mr. Burritt: We might have had, gentlemen of the jury, fifty-seven or fifty-eight star actors here had the railroad company wanted other star actors. They only brought one." The defendant had sworn one passenger and the motorman as witnesses. The record shows the car had a conductor and upwards of 50 passengers. It was not shown any effort had been made to obtain their attendance, nor was the absence of any of them accounted for. It is evident counsel had criticized severely one of the witnesses for the plaintiff. Under these circumstances we do not think, if the allusion made exceeded the latitude to which he was entitled in making his argument, that it constituted reversible error.

4, 5, and 6 may be considered together. The defendant offered four written requests to charge. The first two were given. The third and fourth were not given. The third reads as follows: "It is not the duty of street railway companies to stop or reduce the speed of their trains or cars when they see cows or other animals alongside their tracks. It is only when such animals are on their tracks, or the men in charge of the trains or cars have good reason to believe that they will go thereon before said trains or cars shall have passed, that the company is called upon to stop or reduce the speed of such trains or cars. When they have notice or knowledge of such a situation that to proceed will probably result in injury to or the destruction of persons or property, then they are required to use all possible precautions to guard against such injury or destruction; but until they have notice or knowledge of such a situation it is their right to proceed at the usual speed along and upon their own tracks and right of way, and they will not, in such cases, be liable for injury to or the destruction of persons or property happening upon sudden emergencies which they could not reasonably anticipate. And the court instructs you that in this case the defendant was not obliged to stop its cars, or reduce the speed thereof, at the time and place in question, unless the situation was such that the motorman knew, or had good reason to believe, that to proceed as he was going would result in injury to or the killing of the cow. If he did not know or have good reason to believe this, then the defendant would not be liable in this case, notwithstanding the cow was killed by being struck by the car. And you are instructed in this connection that the law is slow to impute to men in charge of street railway or other trains or cars carrying passengers such reckless and wanton conduct as would be that of run-

ning against animals on the tracks, where the result might be not only the killing of the animals, but the derailling of the trains or cars, and injury to or the death of the passengers; and jurors should not infer such conduct except upon clear proof of its existence." The fourth was a request to direct a verdict in favor of defendant. The first and second of defendant's requests read: "(1) Under the declaration in this case there can be no recovery by the plaintiff for any ordinary negligence on the part of the street railway company. Plaintiff can only recover in case it is established by a preponderance of the evidence that the acts of the street railway company, which it is alleged resulted in the killing of plaintiff's cow, were, under the circumstances testified to, willful, or wanton and reckless. If, therefore, you find from the evidence that the defendant, if guilty of anything, was only guilty of ordinary negligence, or that it was not guilty of willful or wanton and reckless conduct, your verdict should be for the defendant. This is the rule in cases where the plaintiff in a suit is himself guilty of negligence contributing to the injury or destruction of himself or his property, and under the law in this state it is contributory negligence for a person to allow his cows or cattle to run at large without being in the charge of any one. It is for this reason that the plaintiff in this case must prove gross negligence on the part of the defendant, in order to entitle him to recover. (2) The plaintiff cannot recover in this case unless you find that a preponderance of the evidence has established the fact that the defendant was guilty of gross negligence in the killing of plaintiff's cow, as testified to. I instruct you that 'gross negligence' means an intentional failure to perform a manifest duty in reckless disregard of the consequences, as affecting the life or property of another, and also implies a thoughtless disregard of consequences without the exercise of any effort to avoid them. Unless, therefore, you find from the evidence that the defendant, when it saw plaintiff's cow upon the track, or had good reason to believe it would go or stay upon the track, did nothing to prevent running against the cow, but ran on in reckless disregard of the consequences of collision with the cow, you cannot find a verdict for the plaintiff, but must find for the defendant." In addition to giving these requests, the judge also charge: "The plaintiff claims there was a clear and unobstructed view, from the point where the cow was struck, up the defendant's track, for a distance of several hundred feet, and that the cow was in plain view of the motorman who was running the car, and that he saw, or should have seen, the cow, and her apparent danger. The plaintiff charges the defendant with gross negligence; and, for the plaintiff to recover, he must prove by a preponderance of evidence that the cow was killed as a result of the gross negligence of the defendant. The term 'gross negligence' means an intentional failure to

perform a manifest duty in reckless disregard of the consequences, as affecting the life or property of another. It implies a thoughtless disregard of the consequences, without the exercise of any effort to avoid them; but it is not meant that the motorman must have actually intended to do the particular wrong complained of." "It was the duty of the motorman, while running the car, to keep it under control, and to be on the alert to avoid accidents, and, if he saw the cow on the track, or in such close proximity to the track as to be in peril, and he could have avoided the injury by slacking the speed of the car, or by stopping the car, it was his duty to do so, if he could; and his failure to do so would be wanton and reckless conduct—would be gross negligence on his part, which would render the defendant liable for the killing of the cow." In the recent case of *Kotila v. Street Railway Co.* (Mich.) 96 N. W. 437, there is a very full discussion of the care required by motormen in cases like the present. In that case there is a full collation of cases. We think, if there was any one entitled to complain of the charge of the court, it was not the defendant.

7. Did the court err in not directing a verdict for defendant and not granting a new trial because the verdict was against the weight of evidence? We have already referred to the fact that counsel on both sides assumed the jury were familiar with the premises. The trial judge heard and saw the witnesses. There was testimony on the part of the plaintiff to the effect: "There was more than one cow on the track. I think there was about three cows on the track there, feeding, or somewhere, and I said to Mrs. Maynard, 'they will run over them cows sure,' and I watched them for that purpose—for a witness—and the other cows got off, and this one did not. The cows were right inside the tracks between the rails. When I first saw the cows on the track I could hear the car coming up the hill. That was when I made the remark to Mrs. Maynard, and then I watched the car, of course. It was a good ways from the cows, too. The cows were on the track when the car came in sight, and they continued on the track. The car never slacked at all—just like it comes down the hill any time. They generally slaken there at the curve, but they did not. The car was running quite fast. From the point where the cows were standing on the track you can see a long ways up the track. There is nothing along the track to obstruct the view down the track. I cannot say how long the cow was on the track, because I do not know how long it would take them to come down from the hill up there. They must have been up there by Klondyke street any way, when I heard them coming. Two of the cows got off the track. The second cow barely got off just in time, and the other one was nearly off, all but her hind hip. The speed was not slackened at all from the time the car got in sight before it struck the cow." On the cross-examination

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the motorman testified, among other things: "From the point where the cow was struck by the car, and up the track in the direction of Calumet, there was a clear, unobstructed view for several hundred feet. It is downgrade as you come this way, and the car I had charge of was propelled by electric power, and I was acting in the capacity of motorman. I had the hand brake on, and I was coming down the hill the usual gait. When I want to give the car speed, I let off the brake and put on power. I reduce speed, of course, by putting on the brake. That car had air brakes and hand brakes. As motorman I have perfect control of the car. I can run it up over a high trestle, or in coming down that steep grade I can stop the car at pretty near any point I see fit. I had the brake on at that time. I do not mean by that that the air brake was on. I did not apply the air brake. You could not stop the car any quicker by the air brake than you could by the hand brake. If I knew I had to stop the car coming down the hill, I could stop it in two car lengths. I could not stop the car coming down that grade within a distance of forty or fifty feet. It is a conundrum within what distance I could stop the car coming down that hill if I had the air brake on and applied the brake and plugged the car. I could not stop it within the length of the car. If you plug a car, and the circuit break falls out or anything, you would be likely to go a little further. If the circuit breaks do not fall out, I could probably stop the car within a car and a half or two car lengths. When I was coming down that morning I saw two cows by the side of the track, grazing. I was then probably three hundred feet away from the first two. Those two cows were not between the rails then. They were on the side. The third cow was just a little way behind them. The three cows were not inside of the rails when I saw them first. They were walking along when I first saw them, and the next time I looked up they were on the track going across. I continued to look down the track. The cows did not walk by the side of the track at all. They went across the track. They were not standing by the side of the track when I saw them first. They were walking up along taking a bite and walking along. I did not stop to see what they were doing exactly. The last time I saw the cows before they went on the track I was probably two hundred feet from them. They were then going across the track. Of course, I put on the brakes then, and used every effort to stop the car. All I did was to put the brakes on, which reduced the speed." There was other testimony in the case. In view of all the testimony, we think it cannot be said there was no case for a jury. Nor is there such a showing as to warrant us in reversing the case because the trial judge overruled the motion for a new trial.

Judgment is affirmed. The other Justices concurred.

GOLINVAUX *v.* BURLINGTON, C. R. & N. R. CO.

(Supreme Court of Iowa, Nov. 22, 1904.)

[101 N. W. Rep. 465.]

Crossings—Signals—Application of Statute—Street Crossings.

Code, § 2072, requiring railroads to sound a whistle at least 60 rods before reaching a road crossing, and to ring the bell until the crossing is passed, but authorizing the omission of the whistle at street crossings within the limits of cities or towns, unless required by ordinance or resolution of the council, does not require the blowing of the whistle at crossings within city limits, in the absence of ordinance or resolution, but the ringing of the bell should be commenced 60 rods before the crossing is reached, and, if the crossings of the various streets are less than 60 rods apart, the bell should be rung continuously until all are passed.

Same—Negligence—Speed.*

The running of a train at a rate of from 60 to 65 miles an hour in the suburbs of a city is not of itself negligence, but is an item to be considered with other circumstances in determining the question of negligence.

Same—Same—Question for Jury.

In an action against a railroad for injuries at a crossing in the suburbs of a city, the absence of a flagman from the crossing, the failure of the railroad to ring a bell as required by Code, § 2072, together with the speed of the train, which was from 60 to 65 miles an hour, and

*For authorities in this series on the subject of the duties and liabilities of railroad companies with respect to rate of speed of trains approaching crossings, see *Reed v. Queen Anne's R. Co.* (Del.), 11 R. R. 332, 34 Am. & Eng. R. Cas., N. S., 332 (duty to regulate according to danger); *Custer v. Baltimore & O. R. Co.* (Pa.), 9 R. R. 448, 32 Am. & Eng. R. Cas., N. S., 448 (question as to reasonableness of speed, even within city limits or populous districts, may be affected by fact that watchman has been stationed at the crossing); *O'Brien v. Wisconsin Cent. Ry. Co.* (Wis.), 9 R. R. 462, 32 Am. & Eng. R. Cas., N. S., 462 (six miles per hour lawful rate within city at crossing where there are no gates, under Wisconsin statute); *Bass v. Norfolk Ry. & Light Co.* (Va.), 1 R. R. 194, 24 Am. & Eng. R. Cas., N. S., 194 (negligence of street railway); *Boggero v. Southern Ry. Co.* (S. Car.), 4 R. R. 376, 27 Am. & Eng. R. Cas., N. S., 376 (regulation of speed in cities); *Louisville, etc., R. Co. v. Patchen* (Ill.), 10 Am. & Eng. R. Cas., N. S., 852 (speed as negligence); note, 11 Am. & Eng. R. Cas., N. S., 857 (degrees of negligence in not observing statutory requirements); note, 11 Am. & Eng. R. Cas., N. S., 859 (whether any rate is negligence per se); note, 12 Am. & Eng. R. Cas., N. S., 322 (whether rate is negligence a question for jury); *Missouri Pac. Ry. Co. v. Moffatt* (Kan.), 3 Am. & Eng. R. Cas., N. S., 488 (speed as negligence); *Davis v. Concord & M. R. R.* (N. H.), 19 Am. & Eng. R. Cas., N. S., 69; *Swack v. New York, L. E. & W. R. Co.* (N. Y.), 16 Am. & Eng. R. Cas., N. S., 609 (negligence question for jury); *Illinois Cent. R. Co. v. Ashline* (Ill.), 9 Am. & Eng. R. Cas., N. S., 702 (excessive speed); *Stafford v. Chippewa Val. Elec. R. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 364 (sufficiency of evidence as to negligent rate of speed of street car; and test of negligence in rate of speed of street car); *Illinois Cent. R. Co. v. Ashline* (Ill.), 9 Am. & Eng. R. Cas., N. S., 702 (whether excessive speed is negligence per se); *Risinger v. Southern Ry. Co.* (S. Car.), 20 Am. & Eng. R. Cas., N. S., 517 (whether high rate of speed within town constitutes negligence is a question for the jury); *Memphis & C. R. Co. v. Martin* (Ala.), 23 Am. & Eng. R. Cas., N. S., 683 (whether speed constituted wantonness); foot-notes appended to *Omaha St. Ry. Co. v. Larson* (Neb.), 12 R. R. 643, 35 Am. & Eng. R. Cas., N. S., 643 (whether the violation of an ordinance limiting speed of trains is negligence); foot-

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the fact that the view near the crossing was obstructed, made a case for the jury on the issue of negligence.

Same—Care Required of Highway Traveler.†

It is the duty of one approaching a railroad crossing at a place where the view of approaching trains is obstructed to take precautions to ascertain whether a train is coming.

Same—Same—Failure to Listen.

In an action against a railroad for injuries to a person in a wagon by collision with a train at a street crossing in the suburbs of a city, evidence held to show contributory negligence in failing to listen for approaching trains.

Same—Presumption of Due Care on Part of Traveler.

In an action for injuries at a railroad crossing, the presumption of due care on the part of the person injured arising from the instinct of self-preservation is not available where there is direct evidence as to such person's conduct during the entire time that he was within the zone of danger from a passing train.

Appeal from District Court, Black Hawk County; A. S. Blair, Judge.

Action at law to recover damages for the death of Joseph Golinvaux, due to his being struck by one of defendant's trains at a street crossing in the city of Waterloo. Trial to a jury. Verdict and judgment for the defendant, and plaintiff appeals. Affirmed.

C. A. Irwin and Mullan & Pickett, for appellant.

Carroll Wright, John I. Dille, and Miller & Williams, for appellee.

DEEMER, C. J. The deceased, while riding in a lumber wagon with three other men, upon a street in the suburbs of the city of Waterloo, which crossed the defendant's right of way at an acute angle—the street running north and south, and the right of way from the southeast to the northwest—was struck by a train on the defendant's road running from 60 to 65 miles per hour, and he and two of his companions were killed in the accident. The triangular piece of ground to the southeast of the crossing, from which direction the train was coming, was obstructed by trees and buildings so as to more or less obscure the view of trains passing over the right of way. The horses hitched to the wagon were either going at a fast walk or a slow jog, as some of the witnesses say, and the men in the wagon were intently conversing with each other from the time they were first observed in the highway until the team had reached or nearly reached the tracks on defendant's right of way. It was not stopped at any time, nor did the men apparently look or listen for the approach of trains. The negligence charged is failure to

note appended to *Custer v. Baltimore & O. R. Co.* (Pa.), 9 R. R. R. 448, 32 Am. & Eng. R. Cas., N. S., 448 (whether any rate at crossings in the county may constitute negligence).

†As to the care required of a traveler at a highway crossing where the view is obstructed, see foot-note appended to *Chicago & N. W. Ry. Co. v. Andrews* (C. C. A.), 12 R. R. R. 584, 35 Am. & Eng. R. Cas., N. S., 584.

provide a flagman or gateman at the crossing, failure of the operatives in charge of the engine to ring the bell or sound the whistle for the crossing, and the high rate of speed of the train. Defendant denied all negligence and pleaded contributory negligence on the part of plaintiff's intestate, which contributed to the injury complained of.

On the issue of defendant's negligence, plaintiff relies upon a statute which reads as follows: "A bell and steam whistle shall be placed on each locomotive engine operated on any railway, which whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed; but at street crossings within the limits of cities or towns, the sounding of the whistle may be omitted, unless required by ordinance or resolution of the council thereof; and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect." Code, § 2072. By its terms this statute, in so far as it requires the blowing of the whistle, does not apply to street crossings within city limits, in the absence of some ordinance or resolution on the part of the city. There is no evidence here of any such ordinance or resolution; hence that feature is out of the case. It does require, however, the ringing of the bell, which should be commenced when the duty to blow the whistle for other crossings would have ended—that is to say, 60 rods before the crossing is reached; and, if the street crossings are to be less than 60 rods apart, then the bell should be rung continuously from the time the duty to ring begins down until all crossings are passed. There was not sufficient evidence to take the case to the jury on the question of defendant's negligence in failing to keep a flagman at the crossing, although its failure to do so may be taken into account, with other circumstances, in considering the alleged negligence in running the train at a high and dangerous rate of speed over the crossing. Again, the defendant was not responsible for the obstructions to the view of the train, and these did not in themselves constitute negligence on defendant's part; but these matters have a double aspect—first, in determining defendant's negligence in running its train in the manner it did; and, second, as bearing upon the conduct of the deceased in approaching the crossing. Again, the high rate of speed at which the train was operated is not of itself negligence, but it, too, should be taken into account in determining defendant's care or the want of it. Taking into consideration all the evidence in the case, the obstructions near the point of crossing, the absence of a flagman, the high rate of speed of the train, and the testimony regarding the failure to ring the bell, we are constrained to hold that there was enough testimony to take the case to the jury on the question of the defendant's negligence.

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2. The contributory negligence of plaintiff's intestate was the point on which the case was decided and a verdict directed by the court for the defendant, and to that issue we now turn our attention. Plaintiff and his companions were seen approaching the crossing from the south something like 300 feet therefrom. He and the men who were with him were intently engaged in conversation, and, apparently oblivious of the situation, drove up to within a few feet of the crossing, when the pace of the team was slackened somewhat, and then driven as if in an attempt to cross ahead of the train. The wagon was caught between the wheels, and three of the men were killed. Parties living on both the east and west sides of the street heard the train approaching, and noticed that plaintiff and his companions were seemingly unaware of its approach. Two or more of them whistled and hallooed to the men in the wagon, but were unable to attract their attention. They saw that a collision was imminent, for they heard the train, and could see from the actions of the men in the wagon that they did not realize the situation. Plaintiff did not stop his team from the time he was discovered approaching the crossing until he was struck, and neither he nor his companions gave any evidence that they were looking or listening for the train. They were evidently so intently engaged in conversation that they did not hear the warnings given them by the residents of the neighborhood. Plaintiff's intestate had passed over the crossing frequently for more than 25 years, and knew of the obstructions to his view of the track. It was broad daylight, and there were no distracting influences to divert his attention. From the place where he was first seen down to the crossing there were at least two unobstructed views of the track. Had any of the occupants of the wagon looked at either of these places, they could have seen the train. But if the obstructions were so great as plaintiff now contends, and her intestate could not have seen the train while he was traveling something like 240 feet, it was his duty to take some precautions to ascertain if a train was coming, which might endanger him at the crossing. This he did not do. He continued on his way, which was a little down hill, without looking either to the right or to the left, and without giving any evidence that he was listening for a train. He was so absorbed that, while others heard the train, and endeavored as best they could to warn him of his danger and arrest his attention, they could not do so. This, to our minds, conclusively shows that his ears were not open to hear an approaching train. The fact that others heard the train and saw an accident impending is also quite significant. The case is within the rules announced in *Schaefer v. R. R. Co.*, 62 Iowa, 627, 17 N. W. 893; *Dalton v. R. R. Co.*, 104 Iowa, 26, 73 N. W. 349; *Moore v. R. R. Co.*, 102 Iowa, 595, 71 N. W. 569; *Haines v. R. R. Co.*, 41 Iowa, 231; *Banning v. R. R. Co.*,

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89 Iowa, 74, 56 N. W. 277, and other like cases. But plaintiff relies to some extent upon what is sometimes called the presumption arising from the instinct of self-preservation, and asks us to say that this was sufficient to take the case to the jury. Had there been no eyewitnesses to the transaction, doubtless this would be true; but the conduct of the men in the wagon from the time they reached the danger zone down to the time the wagon was struck was covered by direct evidence. In such cases it is the rule of this court that this presumption or inference does not exist. The doctrine seems to be bottomed on the thought that, when there is or can be no evidence regarding one's conduct in a place of danger, the instinct of self-preservation implanted in every human breast will raise an inference that he was not guilty of any negligence which contributed to or brought about the injury. But where there is direct evidence as to his conduct there is no room for this inference, for the reason that his conduct is to be judged from what he in fact did, rather than from an inference as to what he might have done. The entire time during which plaintiff's intestate was in the zone of danger from a passing train, during which he would naturally and reasonably have looked or listened for a train, was fully covered by direct evidence; hence there was no room for any inferences as to his conduct. *Bell v. Town of Clarion*, 113 Iowa, 126, 84 N. W. 962; *Burk v. Walsh* (Iowa) 92 N. W. 65; *Ames v. R. R. Co.* (Iowa) 95 N. W. 161.

There are two other important facts to be considered on this branch of the case. One is this: The railway track crosses the street at such a sharp angle that it runs almost parallel with it for quite a distance southward. A train approaching from the south at the rate of speed this one was would naturally be heard for quite a distance by one approaching the crossing from the south. It was heard by the residents of that vicinity for a long time before it reached the crossing. The other one is that these residents, although they called, hallooed, and whistled in loud tones, could not attract the attention of the men in the wagon. For some reason the plaintiff did not call the man who was in the wagon that escaped with his life as a witness in the case. No excuse was given for not doing so, and we can only surmise as to the reason therefor. As presented to us, the evidence discloses a clear case of contributory negligence, and the motion to direct was properly sustained. Appellant's motion to strike appellee's abstract is overruled, and appellee's motion to dismiss the appeal is also overruled.

The judgment is affirmed.

CHICAGO CITY RY. CO. *v.* BARKER.

(Supreme Court of Illinois, April 20, 1904.)

[70 N. E. Rep. 624.]

Accident at Crossing—Stop and Look.*

Failure of a person about to cross a railroad track to stop and look is not negligence per se.

Same—Contributory Negligence—Evidence—Credibility of Plaintiff's Testimony.

Where plaintiff in an action against a street railway company for personal injuries testified that he looked for an approaching car before going on the track, the alleged fact that, if plaintiff had looked, he must have seen the car which injured him, does not justify the Supreme Court, on appeal, in saying that there was no evidence that plaintiff was in the exercise of ordinary care; the credibility of plaintiff's testimony being a question of fact.

Same—Presumption of Negligence.

While plaintiff was driving along defendant railway company's track, his vehicle was struck from the rear by a sprinkling car having no one in charge of it, and plaintiff was injured. The motorman who had been in charge of the car had fallen off some distance from the point of collision, from the effects, as he testified, of an electric shock: *held* to raise a presumption of negligence on the part of defendant.

Same—Same—Rebuttal—Question for Jury.

In an action for personal injuries from negligence, in which the occurrence of the accident raises a presumption of negligence, the question whether defendant's explanatory evidence sufficiently rebuts the presumption is one of fact for the jury.

Same—Same.

Where the declaration in an action against a street railway company for personal injuries alleged that defendant carelessly, negligently, and wrongfully ran and managed its car, there was no charge of specific acts of negligence, precluding plaintiff from relying on the presumption of negligence arising from the happening of the accident.

Appeal from Appellate Court, First District.

Action by John Eick against the Chicago City Railway Company. From a judgment of the Appellate Court conditionally affirming a judgment for plaintiff, defendant appeals. Pending the appeal, plaintiff died, and Charles Barker, as administrator, was substituted as appellee. Affirmed.

This is an action on the case, brought on August 23, 1900, in the superior court of Cook county, to recover damages for personal injuries claimed to have been suffered by John Eick in consequence of a collision between one of appellant's electric sprinkling cars and a wagon in which Eick was driving. The declaration, as originally filed, consisted of two counts, to which the general issue was pleaded. Subsequently the plaintiff discontinued his action as to the first count, and the cause went to trial before the jury upon the issue tendered by the second count. The jury returned a

*See foot-note appended to *West v. Northern Pac. Ry. Co.* (N. Dak.), 12 R. R. R. 655, 35 Am. & Eng. R. Cas., N. S., 655; *Quinn v. Chicago & E. R. Co.* (Ind.), 12 R. R. R. 661, 35 Am. & Eng. R. Cas., N. S., 661; *Cromley v. Pennsylvania R. Co.* (Pa.), 12 R. R. R. 666, 35 Am. & Eng. R. Cas., N. S., 666.

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verdict of guilty, and assessed the plaintiff's damages at \$5,000, and judgment was entered on the verdict. From this judgment the appellant prosecuted its appeal to the Appellate Court, and there, upon the requirement of a remittitur of \$1,500, which was entered, the Appellate Court entered judgment for the plaintiff in the sum of \$3,500. The present appeal is prosecuted from the judgment so entered by the Appellate Court. The suit was originally begun in the name of John Eick, but, during the pendency of the appeal from the Appellate Court to this court, Eick died intestate, and the present appellee, having obtained letters of administration upon his estate, has been substituted as appellee.

The second count of the declaration alleges that on or about May 14, 1900, in Chicago, the defendant below (appellant here) was owning, controlling, and operating a street railway extending upon and along a certain public highway, to wit, West Forty-Seventh street, and on said street railway was owning, controlling, and operating a certain electric sprinkling car, and then and there said car was proceeding in a westerly direction towards and near the crossing of said West Forty-Seventh street with a certain other public highway, to wit, South Oakley avenue, and plaintiff was then and there riding, as he had a right to do, on a certain wagon on West Forty-Seventh street, and proceeding in a westerly direction some distance in front of said car, and was in the exercise of due care and diligence, and then and there the defendant so carelessly, negligently, and wrongfully ran and managed the said street railway and car that, by and through the carelessness, negligence, and mismanagement of the defendant, said car then and there ran from behind against and into the plaintiff's wagon, on which he was then and there riding as aforesaid, and with great force and violence then and there threw and knocked the plaintiff from and off the said wagon to and upon the ground there, by means whereof, etc.

The facts are substantially as follows: Forty-Seventh street runs east and west, and appellant has a double-track street railway thereon. The east-bound cars are run over the south track, and the west-bound cars over the north track. About a block east of Oakley avenue appellant's tracks on Forty-Seventh street are crossed from southeast to northwest by what are known as the "Panhandle Railroad Tracks," the distance across which at this point is about 100 feet. On May 14, 1900, Eick was riding west upon Forty-Seventh street in a covered wagon, drawn by one horse, upon the north or west-bound track of appellant's railway. There appears to have been upon this track at that time repair work going on at the railroad crossing, and there were piles of material upon the crossing, which made it necessary to use the south or east-bound side of the street to cross the rail-

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road tracks going either way. Upon reaching the Panhandle crossing, Eick stopped, waited for a freight train to pass, then drove over the tracks of the steam railroad south of appellant's tracks because of the obstruction aforesaid, and, when he had passed the crossing, turned back into the north track. After Eick had proceeded 40 or 50 feet in the north or west-bound track, his wagon was suddenly struck in the rear by the sprinkling car. This sprinkling car was a tank about three feet high, and set on ordinary street car wheels, and was not as high as a man's head. The car was an electric motor sprinkler, carrying a water tank, and had been in charge of a single motorman. Before Eick went upon the north track, the sprinkler was east of the railroad tracks, and about 150 yards in his rear. The sprinkler, coming from the east towards the west, was running wildly, with no one in charge of it, and struck Eick's wagon from behind, so that the horse and wagon were forced to one side, and Eick was thrown out of the wagon. The car was stopped a short distance farther on at Oakley avenue by a man who jumped upon the same and disengaged the trolley. At a point about 150 yards east of the Panhandle crossing, the motorman who had been in charge of the sprinkling car fell or was knocked off from the same, and, as soon as he fell, jumped up and attempted to catch the trolley rope, so as to stop the car, but he failed in his attempt, and the car passed on until it struck Eick's wagon.

Mason B. Starring, for appellant.

Richolson & Levy (C. Stuart Beattie, of counsel), for appellee.

MR. MAGRUDER, J. (after stating the facts). At the close of all the evidence the appellant requested the court to give an instruction, directing the jury to find the defendant not guilty, and it is the contention of the appellant that the trial court erred in refusing this instruction. It is claimed by the appellant "that there was no evidence to sustain the verdict of the jury as to the issue, either of the appellant's negligence, or of ordinary care on the part of appellee." The question, which concerns this court is not whether there was any evidence to sustain the issues involved, but whether there was any evidence tending to establish the cause of action in the case.

1. It is said that Eick did not exercise ordinary care for his own safety. There is evidence tending to show that he did exercise such care. When he turned, after passing the steam railroad crossing, from appellant's south track into the north track, he swears that he looked back to the rear, or east, and did not see the sprinkling car. It is true that the wagon in which he was riding was a covered wagon, but he stated that he stretched himself out to one side and looked back. It is not evidence of negligence per se that a person does not

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stop and look back before crossing the track of a railroad, and it is a question for the jury to say whether the failure to so stop and look is, or is not, negligence. *Chicago City Railway Co. v. Fennimore*, 199 Ill. 9, 64 N. E. 985. In the case at bar the testimony of Eick shows that he did look, and that, as a result of his look, he saw nothing approaching in his rear. The argument of the appellant is that his evidence upon this subject was not true, because, under the circumstances, if he had looked, he must have seen the sprinkler approaching. This argument involves a discussion of the facts, which is inappropriate before this court, except so far as it is necessary to determine whether or not the evidence tends to sustain the cause of action. *Chicago City Railway Co. v. Martensen*, 198 Ill. 511, 64 N. E. 1017. It was a question for the jury to decide, from all the circumstances in the case, whether or not the testimony of Eick was true. The testimony is clear and positive on his part that he did look, but whether he looked in such a way as to show that he thereby exercised ordinary care for his own safety, or not, was a matter entirely within the province of the jury to determine. The only ground upon which appellant seeks to show that Eick was not exercising ordinary care is the alleged untruthfulness of his testimony that he looked to see what was behind him. This being so, we are not prepared to say that there was no evidence tending to show that he exercised ordinary care.

2. This is a case for the application of the doctrine *res ipsa loquitur*. While Eick was riding west in his wagon upon the north side of the street, as he had a right to do, an electric motor car belonging to, and under the management of, appellant, and used for sprinkling purposes, with no motor-man or any other person upon it or in control of it, ran up from the rear and struck Eick's wagon, and threw him out upon the ground, and inflicted the injuries for which this suit is brought. This collision gives rise to a presumption of negligence on the part of the appellant, and the burden of proof was upon the appellant to rebut that presumption. The meaning of the maxim *res ipsa loquitur* is that, while negligence is not, as a general rule, to be presumed, yet the injury itself may afford sufficient *prima facie* evidence of negligence, and the presumption of negligence may be created by the circumstances under which the injury occurred. "Where negligence is thus presumed from the occurrence of the injury, defendant is called upon to rebut the *prima facie* case by showing that he took reasonable care to prevent the happening of such injury." *Hart v. Washington Park Club*, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298. In *Hart v. Washington Park Club*, *supra*, quoting from *Scott v. Docks Co.*, 3 Hurl. & C. 596, it was said: "There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or his

servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." *North Chicago Street Railway Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899. In the same case, quoting from *Addison on Torts* (volume 1, § 33), the rule was thus stated: "Where the accident is one which would not, in all probability, happen if the person causing it was using due care, and the actual machine causing the accident is solely under the management of the defendant, * * * the mere occurrence of the accident is sufficient *prima facie* proof of negligence to impose upon the defendant the onus of rebutting it."

There is no doubt here from the evidence that this electric sprinkling car which caused the accident was under the management and control of the appellant. When it was about 150 yards in the rear and east of the point, where Eick's wagon turned to go upon the north track, the motorman in charge of the sprinkling car fell from it to the ground. He was the only person who at the time was upon the car, which had one platform in the rear and one platform in front. At the time when the motorman, whose name was Foley, fell from the sprinkling car, he had one hand on the brakehandle of the car, and the other hand on the barrel tank, but without apparently holding onto anything. While in this position he turned to look back, and says that when he did so he received a shock which threw him from the car. His testimony is, in part: "I don't know whether I was looking back to see whether there were kids, or what was the matter. I put one hand on the brakehandle, and I think I was looking back to see whether there was any water going out of the tank, * * * and the other back on the barrel, and I looked back over the tank; and at that instant, when I put back my hand, I got a shock and fell off involuntarily." It is evident that the motorman received no serious or long-continued injury from the shock, because his own testimony shows that, as soon as he struck the ground, he jumped up and ran after the sprinkler, and attempted to loosen the trolley wire. He says: "I jumped up the moment I fell. I got up as quick as I could, and made one jump to see if I could catch the trolley rope. I failed to get that."

It was for the jury to say, whether the motorman fell from the car on account of an electric shock, which, he says, he received, or whether he fell off as the result of his own conduct in looking back over the barrel without securing a sufficient hold upon some part of the car to prevent himself from falling off. Whether his statement was true—that an electric shock was the cause of his fall—was a matter to be determined by the jury. The testimony introduced by the appellant was to the effect that there was no way in which the

electric apparatus could cause such a shock; that no person had ever heard of such an accident before; that the witness had run the car for three weeks, and during all the morning of that day, without any accident, the accident having occurred about 1 o'clock; that the car was of the best and highest standard of construction; that it was inspected by expert workmen every night; and that any repairs which were needed were promptly made.

The contention of the appellant is that, if it was necessary for it to rebut the *prima facie* presumption of negligence raised by the occurrence of the accident in the manner stated, it did so by showing that the motorman was thrown from the car by an electric shock which the appellant was unable to anticipate or prevent, and that therefore it should not be held responsible because the car was not in the control of any one when it struck Eick's wagon. It was a question for the jury to determine whether the explanation of the accident sufficiently rebutted the presumption in question. The credibility of such rebutting evidence is held by the authorities to be a question for the jury. *Ugla v. West End Street Railway Co.*, 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481; *O'Flaherty v. Nassau Electric Railway Co.* (Sup.) 54 N. Y. Supp. 96. In actions brought for damages alleged to result from fire caused by the escape of sparks from locomotive engines, the fact of the communication of the fire to the property destroyed or injured is taken as *prima facie* evidence to charge with negligence the corporation or other person who at the time of the injury is in the use and occupation of the railroad, and in such cases "the question whether the defendant's evidence was sufficient, under all the circumstances, to rebut the *prima facie* proof of negligence, arising from the undisputed fact that the fire was communicated from the engine was clearly a question of fact for the jury, and as to which the judgment of the Appellate Court is conclusive." *Louisville, Evansville & St. Louis Consolidated Railroad Co. v. Spencer*, 149 Ill. 97, 36 N. E. 91; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Hornsby*, 202 Ill. 138, 66 N. E. 1052. As is said by the Appellate Court in their opinion deciding this case: "In the case at bar, it was for the jury to consider whether the explanation offered by appellant relieved it from the presumption of negligence raised by the undisputed facts. If appellant ran its car in an unsafe condition, evidence tending to show such condition was admissible under the second count."

It is said, however, on the part of the appellant, that the declaration in this case charged specific acts of negligence, and that therefore Eick was not entitled to rely upon presumptive negligence. The cases of *West Chicago Street Railroad Co. v. Martiu*, 154 Ill. 523, 39 N. E. 140, and *Chicago & Eastern Illinois Railroad Co. v. Driscoll*, 176 Ill.

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330, 52 N. E. 921, are relied upon in support of this position. But the facts of the latter cases, when carefully examined, will show that they have no application to the case at bar. The declaration here charges that the appellant "carelessly, negligently, and wrongfully ran and managed its car." If the appellant placed the sprinkling car under the control of a motorman, who lost control of it by his own carelessness, then the sprinkling car was not properly run and managed by the appellant. We think that the declaration is sufficiently general in its terms to take the case at bar out of the rule announced in the cases last referred to. The second count of the declaration here does not charge that any servant of the appellant was guilty of specific acts of negligence, but charges that the appellant itself carelessly ran and managed its electric sprinkling car. The second count of the declaration does not state in or by what specific acts the carelessness in driving or managing the car was manifested—whether by running at a greater rate of speed than safety or prudence required, or by improper and insufficient exercise of control on the part of the motorman, or by some other means.

"Carelessness and impropriety are not descriptive of specific acts, but of a class of acts only, which may include an indefinite number of specific acts, each differing in its character from the others." *Chicago, Burlington & Quincy Railroad Co. v. Harwood*, 90 Ill. 425.

We are of the opinion that there was sufficient evidence tending to show that the appellant was guilty of such negligence as caused the injury to justify a submission of the question of negligence to the jury.

Accordingly the judgment of the Appellate Court is affirmed. Judgment affirmed.

DUNWORTH v. GRAND TRUNK WESTERN RY. CO.

(Circuit Court of Appeals, Seventh Circuit, October 24, 1903.)

[127 Fed. Rep. 307.]

Contributory Negligence—Trial—Direction of Verdict.

Where, in an action for death resulting from defendant's alleged negligence, it followed as a necessary conclusion and as a matter of law, from the facts disclosed, that deceased was guilty of contributory negligence, and that there could be no recovery under any proper view of the facts, it was the duty of the trial court to direct a verdict for the defendant.

Same—Railroads—Crossings—Injuries to Pedestrians.

Where a street car conductor left his car at a railroad crossing, and went on the track to see if it was clear, and on seeing a train approaching on one of the tracks stepped back onto another, and stood there waiting for the train to pass, when he was struck and killed by a train approaching from the rear on such track, which he could have seen if he had looked, and there was unobstructed space of 10 feet between the crossing gates and the first track in which he

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could have stood in safety, he was guilty of contributory negligence as a matter of law.

Same—Negligence of Defendant—Statutory Regulations—Noncompliance.*

Where deceased, who was killed while standing on a railroad crossing, was guilty of contributory negligence as a matter of law, the fact that defendant was at fault for noncompliance with statutory regulations did not preclude it from relying on the defense of plaintiff's contributory negligence.

Same—Proximate Cause.

Where, in an action for death of plaintiff's intestate at a railroad crossing, it did not appear that decedent's presence on the track was observed by the locomotive engineer, or that after seeing him, and after knowledge that he was unobservant of his danger, there was time to avoid the catastrophe, defendant was not liable, notwithstanding plaintiff's contributory negligence, on the ground that by the exercise of ordinary care defendant might have avoided the consequences of decedent's negligence.

Grosscup, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

This action is brought by the plaintiff to recover damages sustained by reason of the death of her intestate, caused, as alleged, by the wrongful acts of the defendant at a street crossing of its railway. The negligence charged was that the bell of a locomotive engine approaching and crossing South Halsted street was not rung or its whistle sounded, that no headlight was exhibited, and that the gates were not lowered. There was a plea of the general issue. At the trial, upon the conclusion of the evidence for the plaintiff, the court directed the jury to render a verdict for the defendant, for which supposed error the cause is brought here for review.

The two tracks of the defendant's railway running east and west intersect Halsted street, in the city of Chicago, at right angles, and for a long distance the tracks are straight. The north track is used by west-bound trains; the south track by east-bound trains. Ten feet south of the south rail of the south track are gates, and from eight to ten feet south of the gates, and on the west side of the street, is a small station. From this station the view to the west along the tracks is unobstructed, the space between the south rail and the gates and the station being unoccupied. At the west line of the street there is a switch track which curves to the south, and then to the west, running for some distance parallel to the south track, about on a line with the station house. The street car line of the Chicago City Railway Company located upon Halsted street crosses these railway tracks. The deceased was a conductor in the service of that company. The car upon which he served was on a trip north, and had come to a stop south of the railway gates, to allow the conductor to

*See extensive note appended to *Macon, D. & S. R. Co v. McLendon* (Ga.), 11 R. R. R. 153, 34 Am. & Eng. R. Cas., N. S., 153.

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go forward, according to his customary duty, to ascertain if the way was clear and to signal the car when the way should be clear. The evidence is contradictory whether the gates were lowered before Dunworth went upon the crossing. As he passed the gates a west-bound freight train was approaching Halsted street from the east upon the north track, and was some 300 feet away. Dunworth went to the north track, and, in the language of a witness for the plaintiff, "when the conductor saw the gates coming down and the train approaching he came back to the south track and stood on the track." He took a position between the rails of the south track, where he remained for from two to four minutes, looking north-east and north, watching the freight train as it approached and was passing. At this time an engine coming from the west approached on the south track at a speed of eight miles an hour, backing up, its bell not being rung or its whistle sounded, and without a headlight on the tender of the engine, and struck and killed Dunworth. This was before the freight train had passed. The time was December 4, 1901, at about 7 o'clock in the evening. The night was dark, but the ground was covered with snow to a depth of two inches, making "it look quite light." The locality was also lighted by an electric arc light suspended over the center of Halsted street.

James Hamilton Lewis, for plaintiff in error.
Kenesaw M. Landis, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). If the facts, or the inferences to be drawn from them, with respect to contributory negligence, be doubtful, the case is one for the jury. But if from the facts disclosed the conclusion follows as a matter of law that there can be no recovery in any proper view of the facts, it is the duty of the trial court to direct a verdict. *Schofield v. Railway Company*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Railway Company v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Railway Company v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Gardner v. Michigan Central Railroad Company*, 150 U. S. 349, 361, 14 Sup. Ct. 140, 37 L. Ed. 1107; *Warner v. Baltimore & Ohio Railway Company*, 168 U. S. 339, 348, 18 Sup. Ct. 68, 42 L. Ed. 491; *District of Columbia v. Moulton*, 182 U. S. 576, 579, 21 Sup. Ct. 840, 45 L. Ed. 1237.

The facts in the case at bar are without contention, and were disclosed by the evidence of the plaintiff. It was the duty of the deceased to go upon the crossing to see if a train was approaching from either direction, and to signal the motorman if and when the way was clear for the crossing of

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the street car. But the performance of this duty did not absolve him from the duty of care with respect to his own safety. He was there to look for danger. That was his duty, not only with respect to the service in which he was engaged, but with respect to himself in the performance of that duty. These duties were concurrent. After the gates were lowered the street car could not cross until after the passage of the freight train. The deceased had then no duty to perform with respect to the street car until the train had passed and the gates had been raised. Until that should occur, duty to himself, if not to the railway company, required that he should stand in a place of safety. There were ten feet in width of unobstructed space between the south rail of the south track and the gates, where he could have stood in absolute safety and in full view of the situation. Instead, he took his position between the rails of the south track with his back or side to the west, from which direction alone danger upon that track was to be apprehended, and, without looking to the west, watched the coming and passing of the west bound train upon the north track. This is abundantly proven by the concurrent testimony for the plaintiff. Those speaking to the question, and who were watching him as he stood there, saw him look but in the one direction. Such conduct can be characterized only as reckless. Without necessity he deliberately placed himself in a situation of known danger. In the open space he would have been immune from danger, and with equal facilities for seeing in both directions. He had no right to stand upon the track. Taking the risk, the consequences should not be imposed upon another. *Railroad Company v. Houston*, 95 U. S. 607, 24 L. Ed. 542; *Schofield v. Railway Company*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Northern Pacific Railroad Company v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014.

It is urged that, because the defendant was in fault for non-compliance with statutory regulations, contributory negligence of the party injured is unavailing as a defense, and this is said to be stated with absoluteness in *Deserant v. Cerillos Coal Railroad Company*, 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127. It was there ruled that the master's liability to furnish a safe working place for his servant is not absolved by the concurrent negligence of a fellow servant. The charge of the trial court there under consideration contained the clause (paragraph 13, p. 417, 178 U. S., page 971, 20 Sup. Ct., 44 L. Ed. 1127) that if the servant knew of the failure of his employer to perform his statutory duty, and still remained in service in the dangerous place, he assumed the risk. This charge was not even excepted to or suggested as erroneous. The case gives no color to the contention of counsel. The contrary principle is sustained by the Supreme Court in the cases above referred to. In *Railroad Company*

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v. Houston, *supra*, the court, referring to failure to sound the whistle or ring the bell, says that such failure did not relieve from the necessity of taking ordinary precaution for safety; that negligence in these particulars is no excuse for want of ordinary care. The law furnishes no support for the contention of counsel.

It is also said that the contributory negligence of the deceased should not prevent a recovery if the locomotive engineer, in the exercise of ordinary care, might have avoided the consequence of the deceased's negligence; and this under the modification of the rule as held by the Supreme Court in *Inland & Seaboard Coasting Company v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Railway Company v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. There are no facts disclosed in this record calling for the application of the modification of the rule. It does not appear that the presence of the deceased upon the track was observed by the locomotive engineer, or that after seeing him, and after knowledge that he was unobservant of his danger, there was time to avoid the catastrophe. To bring the case within the modification of the rule it is incumbent upon the plaintiff to make a showing calling for its application.

CENTRAL OF GEORGIA RY. CO. v. DICH.

(Supreme Court of Georgia, Oct. 15, 1904.)

[48 S. E. Rep. 683.]

Railroads—Killing Stock—Evidence.*

The only eyewitnesses to the killing of the horse were the servants of the railroad company. Their testimony was consistent, and demonstrated that by the exercise of ordinary care the killing of the horse could not have been averted. There was no evidence that their testimony was untrue. The presumption against the railroad company arising from proof of the killing was successfully overcome. The court erred in refusing to grant a new trial.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by S. Dich against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Lawton & Cunningham, for plaintiff in error.

Robt. L. Colding, for defendant in error.

EVANS, J. Judgment reversed. All the Justices concur.

*See extensive note appended to *Macon & B. R. Co. v. Revis* (Ga.), 12 R. R. R. 787, 35 Am. & Eng. R. Cas., N. S., 787.

DENISON, B. & N. O. R. CO. v. BARRY.

(Supreme Court of Texas, Nov. 21, 1904.)

[83 S. W. Rep. 5.]

Obstruction of Water—Overflow—Damages—Unforeseen Injury—Fright and Sickness.*

A railroad company, which, in constructing a dump, fails to provide sufficient sluices to allow a free passage of water, is liable for a consequent overflow and damage to property situated near thereto, and which it should have foreseen, but not for fright and resulting sickness caused to a person living in the vicinity, as such injury was not one which should have been reasonably anticipated.

Same—Injury to Property—Measure of Damages.

In an action against a railroad for damages for the construction of a dump which did not afford a sufficient waterway, where the petition allege that the dump was a permanent structure, a continuing nuisance, and practically destroyed the value of plaintiff's premises, the measure of damages was the difference in the value of the property before the injury and its value immediately thereafter.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by P. A. Barry against the Denison, Bonham & New Orleans Railroad Company. There was a judgment of the Court of Civil Appeals affirming a judgment for plaintiff (for opinion, see 80 S. W. 634), and defendant brings error. Reformed and affirmed.

Thurmond & Steger, for plaintiff in error.

Taylor & McGrady, for defendant in error.

GAINES, C. J. The defendant in error brought this suit against plaintiff in error to recover damages for overflows of a lot which he owned, and upon which he resided, alleged to have been caused by a dump constructed by the railroad company. The damages claimed were to the lot, to certain personal property, and for sickness of his wife, and the resulting expenses of such sickness. We deem it necessary to pass upon but two questions, and these require no detailed statement of the facts.

It is first complained on behalf of the plaintiff in error that the court erred in allowing damages for the sickness and mental suffering of the wife, and the expenses incident thereto. We are of opinion that the assignments which raised this question should have been sustained. The allegations with reference to this matter were that the overflow of May 18, 1902, "drove plaintiff and his family from his home, and kept them away from their home for three days, and subjected them to exposure and inclement weather, and greatly injured the plaintiff's wife, in this: that she was then in a

*As to what is, and is not, the proximate cause of an injury, see foot-note appended to *Haley v. St. Louis Transit Co.* (Mo.), 12 R. R. 142, 35 Am. & Eng. R. Cas., N. S., 142, where all the preceding authorities in this series are collected or referred to.

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state of pregnancy, and when said water backed up and over said lot and surrounding territory, and kept getting higher and up to the floor of the house, and even into the house, it greatly frightened plaintiff's wife, and presented the appearance of the water continuing to rise and drown her and other members of plaintiff's family, and so frightened her as to cause her great physical and mental injury and pain, and plaintiff in the exercise of ordinary care, and believing that his wife would be drowned if she remained in their home, he removed his wife therefrom, and to a place of safety, and, in so doing, necessarily subjected her to outdoor and inclement weather exposure, and such fright to plaintiff's wife and her exposure greatly shocked and made her sick, and thereby rendered very ill and confined to her bed for several weeks, and caused her to suffer great pains and shocks to her nerves, and pains about her womb, and threatened her with miscarriage for several days, and permanently impaired her health." The damages claimed in this particular we think entirely too remote. While in constructing its dump the defendant company should have foreseen that, in case the sluices and waterways provided should prove insufficient to allow a free passage of water, it might cause an overflow and damage to property situated near thereto, and upon the upper side thereof, it could not reasonably have been anticipated that the conditions would be such as to cause such a degree of fright to any one as to produce sickness or other physical injury. We think the case falls strictly within the principles announced in several cases in this court, namely, that a party guilty of a negligent act is not responsible for such consequences of that act as could not have been reasonably anticipated. *Neely v. Railroad Co.*, 96 Tex. 274, 72 S. W. 159; *T. & P. Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162; *Lipscomb v. Railway & Express Co.*, 95 Tex. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804. The cases of *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618, and of *Gulf, Colorado & Santa Fe Railway Company v. Hayter*, 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. Rep. 856, are clearly distinguishable. In the former the question was as to the sufficiency of the petition to show a cause of action. The headnote shows clearly the point decided in that case. It is as follows: "It was alleged in the petition that the plaintiffs were husband and wife, and were in possession under a lease of a dwelling house on land owned by defendant; that the wife was well advanced in pregnancy, the defendant knowing the fact, and that any undue excitement to a woman in that condition was likely to prove a serious injury to her health; that, notwithstanding these facts, defendant came to plaintiff's house, and in the yard, in the immediate presence of the wife, he assaulted two negroes in a boisterous and violent manner, and that the assault was accompanied with profane language, and resulted in drawing

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blood; that the conduct of defendant frightened the wife, and brought on the pains of labor, and eventually produced a miscarriage, and otherwise seriously impaired her health. Held, that the allegations constituted a cause of action." If the defendant there knew that the wife was in an advanced state of pregnancy, and if he also knew that the result upon her of any undue excitement was to produce a miscarriage, there can be no question but that he should have anticipated the consequences of his act. So in the Hayter Case the alleged cause of action was for injuries resulting from the negligence of the defendant company in running its train at a crossing into a train of another railroad company, upon which plaintiff was a passenger. The question whether the employees operating the train of the defendant company ought to have anticipated that passengers on the other train might be frightened was not involved in that case. The only point decided was that where one has been frightened directly by the negligence of another, and that fright has resulted in a physical injury to him, he has a cause of action for such injury.

We think the other questions presented by the application for the writ of error were correctly determined by the Court of Civil Appeals. As to the measure of damages, however, we will add a few remarks. The plaintiff, in his petition, alleged that the dump in question "is a permanent structure, a continuing nuisance, and practically destroys the value of plaintiff's premises." In such a case we are of opinion that the difference in the value of the property before the injury and its value immediately thereafter is the correct measure of damages. *Rosenthal v. Railway Co.*, 79 Tex. 325, 15 S. W. 268. The result of a recovery upon such cause of action is to compensate the plaintiff for his damages, past and future, and to preclude him to recover for other damages arising from the same cause.

The jury, as directed by the court, assessed the damages for the sickness of plaintiff's wife and for medical and physician's services separately from the other items of damage. These damages amount to \$400. The judgment is to be reformed as to deduct this sum from the amount recovered, and, being so reformed, it is affirmed.

WABASH R. CO. v. BILLINGS.

(Supreme Court of Illinois, Oct. 24, 1904.)

[72 N. E. Rep. 2.]

Accident at Crossing—Pleading and Proof—Variance.

The declaration alleged that, while plaintiff was driving over defendant's crossing, an engine struck plaintiff's vehicle, whereby plaintiff was thrown out and injured. The evidence tended to prove

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that a car struck the vehicle, but that he was not then thrown out, but the horse ran away and plaintiff was thrown out and injured: *held*, that there was a clear variance.

Same—Same—Same.

The variance might have been cured by an amendment on application.

Variance—Amendment.

An objection because of a variance between the complaint and evidence is one that must be taken in the trial court, so as to permit the opposite party to obviate the variance by amendment.

Accident at Crossing—Subsequent Fall from Vehicle—Remote Cause.*

Where plaintiff's vehicle, when crossing a railroad track, was struck by an engine, and the horse ran away, and in passing over a curb plaintiff was thrown out and injured, if the collision was the efficient cause of the accident the mere incidental cause of the vehicle dropping into a gutter so as to throw plaintiff from it without contributory negligence on his part, would not make the striking of the vehicle the remote cause.

Same—Witnesses—Credibility of Railroad Employees—Argument of Counsel.†

In an action for injuries at a crossing accident, counsel for plaintiff, in arguing to the jury, said, "These powerful railroad corporations ignore the rights of citizens, maim or kill them at pleasure, and then bring in their employees to swear them through," and that most of the witnesses for the defense were employees of the defendant and had to swear the way they did or lose their jobs, and that they ought not to be believed for that reason: *held*, that such statement by counsel was error.

Same—Same—Same—Contributory Negligence—Excessive Verdict—Remittitur.

In an action for injuries in a crossing accident, the evidence for defendant tended to show plaintiff guilty of contributory negligence. Plaintiff's counsel stated that powerful railroad corporations ignore the rights of citizens, maim or kill them at pleasure, and then bring its servants to swear them through. The jury returned a verdict for \$5,000. Plaintiff's injuries consisted of a fracture of his arm, a scalp wound, and a sprained foot, and plaintiff remitted \$2,000 from the verdict: *held*, that, although the trial court instructed the jury to disregard the remarks of counsel, the remarks were cause for a reversal, notwithstanding the remittitur, as the prejudice shown by the excessive verdict might have entered into the determination of other issues.

Appeal from Appellate Court, Third District.

Action by Thomas Billings against the Wabash Railroad Company. From a judgment of the Appellate Court (105 Ill. App. 111) affirming a judgment in favor of plaintiff, defendant appeals. Reversed.

C. N. Travous, for appellant.
S. H. Cummins, for appellee.

*For the authorities in this series on the question of what is, and what is not, the proximate cause of an injury, see foot-note appended to *Haley v. St. Louis Transit Co.* (Mo.), 12 R. R. R. 142, 35 Am. & Eng. R. Cas., N. S., 142.

†See foot-note appended to *Seaboard Air Line Ry. v. Walthour* (Ga.), 8 R. R. R. 18, 31 Am. & Eng. R. Cas., N. S., 18; note appended to *Macon & B. R. Co. v. Revis* (Ga.), 12 R. R. R. 787, 35 Am. & Eng. R. Cas., N. S., 787.

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CARTWRIGHT, J. The Appellate Court for the Third District affirmed a judgment recovered by appellee in the circuit court of Sangamon county against the appellant in an action on the case for personal injuries, and this appeal was prosecuted from the judgment of the Appellate Court.

At the trial the defendant presented a motion in writing that the court should exclude the evidence and direct a verdict of not guilty, assigning different grounds for the motion, among which was the following: "Second. It is alleged in the declaration that plaintiff's buggy in which he was riding across defendant's track was struck by defendant's car or train, and plaintiff then and there thrown out and injured, whereas the testimony shows that plaintiff's injuries resulted from his falling from said buggy when some distance from the defendant's track or crossing." The motion was overruled, and defendant excepted. The declaration contained several counts in which the language varied slightly, but it was alleged in each count, in practically the same words, that while the plaintiff was riding in a buggy on Adams street, in Springfield, over the railroad crossing, the defendant's engine and train struck said buggy with great force and violence, and the plaintiff was then and there thrown out of said buggy with great force and violence upon the ground there, and was thereby injured. There are three tracks of the defendant crossing Adams street, and the evidence on the part of the defendant tended to prove that he approached the crossing from the east, and as he was going over the east track, when the hind wheels of the buggy were between the rails, an engine headed south pushed a baggage car ahead of it against the buggy, shoving it to the south; that, just before the car struck the buggy, plaintiff slapped the horse with the lines, and the horse started at a faster gait; that, when the buggy was struck, plaintiff lost his balance and was thrown to the north edge of the seat; that he let go of the lines, and grabbed hold of the seat with his left hand; that he was not hurt or thrown out at that place, but the collision threw him off his balance, and the horse ran away; that the horse ran upon a grass plot between the sidewalk and curbing west of the crossing, and ran back into the driveway 80 or 100 feet west of defendant's tracks; and that in passing over the curb the buggy dropped 16 or 18 inches into the gutter, and plaintiff was thrown out upon the brick pavement, causing a fracture of his arm, a scalp wound, and a sprained foot.

It is a well-known rule that allegations and proofs must correspond, both for the purpose of specifically advising the opposite party of what he is called upon to answer, and also of preserving a record of the cause of action as a protection against another suit based upon the same cause. A pleading is intended to disclose a cause of action or defense, and a party has a right to know what he is charged with, to enable

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him to properly make out his case, and to prevent his being taken by surprise by the evidence at the trial. The author of the article on "variance," in the Encyclopedia of Pleading and Practice, says (volume 22, p. 527): "It is a general rule in actions at law that, in order to enable a plaintiff to recover or a defendant to succeed in his defense, what is proved or that of which proof is offered by the party on whom lies the onus probandi, must not vary from what he has previously alleged in his pleadings; and this is not a mere arbitrary rule, but is one founded on good sense as well as good law." Every allegation which is descriptive of the cause of action must be proved as alleged in the pleading and any variance therefrom is fatal, unless it is waived by not calling it to the attention of the trial court, or is cured by an amendment of the pleading. Even if there are unnecessary allegations descriptive of what is material, they must be proved. *Bell v. Senneff*, 83 Ill. 122; *City of Bloomington v. Goodrich*, 88 Ill. 558; *Chicago, Burlington & Quincy Railroad Co. v. Dickson*, 143 Ill. 368, 32 N. E. 380; *Wabash Western Railway Co. v. Friedman*, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111; *Wisconsin Central Railroad Co. v. Wieczorek*, 151 Ill. 579, 38 N. E. 678; *Chicago & Alton Railroad Co. v. Rayburn*, 153 Ill. 290, 38 N. E. 558. An objection for variance is one which must be taken in the trial court, so as to permit the opposite party to obviate the variance by amendment; but in this case the objection was specifically made, and no amendment was made to meet it, although the objection was curable by that means. Instead of proving that the buggy was struck by the baggage car, and plaintiff was thereby then and there thrown out of the buggy upon the ground and injured there, plaintiff introduced evidence that he was neither thrown out nor injured there, but that he lost his balance and the horse ran away, and, in coming back over the curb and dropping into the gutter, he was thrown out and injured on the street. It is true that torts are divisible, and that proof of a part of the allegations, if sufficient to establish a cause of action, will sustain a judgment; but there is no question of that kind in this case, in which the evidence went beyond the allegations and proved a different tort. There was a clear variance, which was brought to the attention of the trial court and the plaintiff, and it was not cured by an amendment, as it might have been.

It is argued that there was no error in the ruling because the striking of the buggy by the car was the proximate cause of the injury. But that is only saying that plaintiff proved a good cause of action, while the question was whether the tort described in the declaration was the one proved upon the trial. If by the exercise of reasonable care the defendant might have foreseen that an injury would result from backing the baggage car against the buggy, and that was the last

negligent act contributing to the injury, without which it would not have occurred, it would be the proximate cause. If that was the efficient cause, the merely incidental cause of dropping into the gutter, without contributory negligence on the part of the plaintiff, would not make the striking of the buggy a remote cause. In such a case the proximate cause need not be the nearest in point of time or sequence of events. But that was not the question raised by the motion.

Counsel for plaintiff, in arguing the case to the jury, said to them: "These powerful railroad corporations ignore the rights of citizens, maim or kill them at pleasure, and then bring in their employees to swear them through; that most of the witnesses for the defense were employees of the defendant and had to swear the way they did or lose their jobs, and that they ought not to be believed for that reason." Counsel for defendant interposed an objection to such a course of argument, and the court sustained it, and said to the jury that the remarks were improper, and that they should disregard them and decide the case upon the merits, and according to the law as the court should give it in the instructions. Such a statement by counsel is wholly indefensible, and, unless it can be seen that it did not result in injury to the defendant, the judgment ought to be reversed on account of it. The effects of such an attack may be obviated by the action of the court in some cases, while in others it may be effective in arousing passion and prejudice notwithstanding the direction of the court. In this case the jury returned a verdict for \$5,000, and on a motion for a new trial the plaintiff confessed that the damages awarded were grossly excessive by remitting \$2,000 from the verdict. In the case of *Loewenthal v. Streng*, 90 Ill. 74, where there was a verdict against defendant for \$10,000, and plaintiff entered a remittitur of \$4,000—the same proportion as in this case—it was held that, where the damages allowed are so excessive that they can only be accounted for on the ground of prejudice, passion, or misconception, a remittitur will not obviate the error, because these elements may have entered, and probably did enter, into the finding of other facts important to the issue, if not the issue itself. We have frequently held, where there has been a fair and impartial trial, that a merely excessive allowance of damages may be cured by a remittitur, and the Legislature, by section 81 of the practice act (Hurd's Rev. St. 1903, p. 1411, c. 110), have approved the allowance of remittiturs in the Appellate Court and this court; but a remittitur will not cure an error which influenced the finding of the jury on issues of fact. The evidence for the defendant was that the plaintiff came upon the crossing without observing any of the usual and ordinary precautions in such places, that his horse was on a run, and that the car did not strike the buggy at all. On those questions the defendant was entitled to the judgment of the jury after a fair and

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impartial trial, and, as it does not appear that the ill effects of the statement objected to were obviated by the ruling of the court, the same influence may have affected the verdict on those questions. In considering a motion for a new trial on the ground that the damages are excessive, the court must determine that a question, and if a party, by remitting a part of the verdict, removes the objection, the opposite party will have no cause for complaint on that ground; but if the verdict on the questions of fact involving the liability of the defendant has been improperly influenced, a remittitur will not cure the error. We do not think that it appears from the record that the remarks were not prejudicial, notwithstanding what was said by the court, and they related to the merits and the veracity of the defendant's witnesses.

Objection is made to an instruction given at the request of plaintiff, but we do not think it would mislead the jury. For the errors indicated, the judgments of the Appellate Court and the circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

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(Supreme Court of Montana, Oct. 19, 1904.)

[78 Pac. Rep. 303.]

Killing Stock—Failure to Fence—Liability—Statutes.

Report of Civil Code Commission, § xxvii, states that the Code was almost entirely taken from the Civil Codes of California and of New York. No such section as section 950 of the Civil Code of Montana appears in the New York Code. Section 485 of the the Civil Code of California provides that railroad companies must make and maintain a sufficient fence on either or both sides of the track, and that, in case they do not do so, if their trains injure any stock on the line of their road which passes through or along the property "of the owners" thereof, they must pay to the owner of such animals a fair market price unless it occurred through the negligence of the owner, but that railroad companies paying to the owner of land through or along which their road is located an agreed price for the making and maintaining of such fence, or paying the cost of it on an award of damages allowed for the right of way "are" relieved from all claims for damages arising from the injuring of any animals or persons who so fail to construct. Section 950 of the Civil Code of Montana is identical with section 485, except that the quoted phrase "of the owners" thereof is omitted, and the quoted word "are" appears as "and;" *held*, that it was the intent of the Legislature to adopt section 485, thereby enacting a law requiring a railroad company, wherever it located a line of road along or through the property of a landowner, to fence the side of its line next the property if laid along the same, or both sides if laid through the property, or to pay the owner for stock killed unless it occurred through the neglect of the owner, and unless the latter part of the statute had been complied with.

Same—Petition.

In an action against a railroad under Civ. Code, § 950, it is necessary that the petition allege plaintiff's ownership or possession.

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of land along or through which the railroad runs, and that the stock was killed at such place.

Same—Pleading—Admissions.

In an action against a railroad under the statute, failure to deny an allegation of the answer that the place where the killing occurred was a public station amounted to an admission of such fact.

Same—Negligence—Pleading.

In an action under Civ. Code, § 950, no allegation of negligence in the operation of the train is necessary.

Same—Duty to Fence.

The statute does not require a railroad to fence at a station.

Same—Whether Killed by Trains—Evidence.*

Where in an action against a railroad under Civ. Code, § 950, the only evidence was that the animals were found near the track, one dead and the other injured so that it had to be killed, and no showing was made as to the character of the injuries except that one had its leg broken, such evidence was insufficient to show that the animals were killed by an engine or cars of defendant.

Appeal.

Want of evidence to support a judgment may be relied on and considered on appeal.

Commissioners' Opinion. Appeal from District Court, Silver Bow County; Wm. Clancy, Judge.

Action by Charles Beaudin against the Oregon Short Line Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

John G. Willis, for appellant.

Kirk & Clinton, for respondent.

CLAYBERG, C. C. This is an appeal from a judgment rendered against the railroad company for the alleged killing of certain stock. The only allegation in the complaint upon which the liability of the railroad company is claimed to rest is as follows: "That on or about the 3d day of March, A. D. 1901, at a point on its railway known as 'Beaudin's Spur,' Silver Bow county, Montana, the said defendant, through and by reason of the carelessness of its servants, agents, and employees, and by reason of failing to maintain good and sufficient fences on either or both sides of their track and property, as provided by section 950 of the Civil Code of the state of Montana, with its engine and cars ran into, over, and upon two certain male colts belonging to the plaintiff, whereby said colts received injuries from which they died, to the damage of the plaintiff in the sum of one hundred dollars, the value of the said colts so killed." To this complaint defendant answered, denying this allegation, and then averred that the place where the alleged killing took place was a public station and depot, and used as such. No replication was filed to this answer. At the trial of the case defendant objected to the introduction of any evidence on the ground that, the complaint "does not state facts sufficient to constitute a

*See extensive note appended to *Macon & B. R. Co. v. Revis* (Ga.), 12 R. R. R. 787, 35 Am. & Eng. R. Cas., N. S., 787.

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cause of action." This objection was overruled. At the close of plaintiff's testimony defendant moved for nonsuit on the same and other grounds. This motion was also overruled. After the introduction of defendant's testimony the cause was submitted to the jury, which rendered a verdict for the plaintiff. Judgment was entered upon this verdict, and the defendant appeals from the judgment.

1. The code commission in their final report of 1892 say of the Civil Code reported therein: "This Code is almost entirely taken from the Civil Code prepared by the Honorable David Dudley Field for the Legislature of the state of New York and the Civil Code adopted by the state of California." (Sec. xxvii, Final Report of Comm.) No such section appears in the New York Code, so we conclude that section 950 referred to in the complaint was adopted from California. It was reported by the code commission, and first appears in our Civil Code of 1895. The section of the present California Civil Code (section 485) first appears in the statutes of that state in the year 1861 (section 40), and has been carried forward ever since. It was undoubtedly the intention of the Legislature to adopt this section of the California statute verbatim. It did so with the exception of three words, which were undoubtedly omitted by mistake, and the use of the word "and" for "are" in another part of the section. Section 950, at the point where this omission occurs, reads as follows: "In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property thereof." This part of the section is incomplete, and almost unintelligible. To what antecedent does the word "thereof" refer? It is apparent that something was omitted. An examination of the statute of California above referred to fully explains this omission. The same portion of the statute of that state reads as follows: "In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owners thereof." With this insertion the statute becomes plain and intelligible. But upon reading the remainder of section 950 it is apparent that the Legislature had under consideration and intended to enact a law requiring a railroad company, whenever it located its line of road along or through the property of an owner of land, to require it to fence the side of its line next to such property if it was laid along the same, or both sides of the track if it was laid through such property, or to pay to the owner of such land the market value for all his stock killed by the railroad company on the line of road passing through or along such property, "unless it occurred through the neglect or fault of the owner of the animal so killed or maimed," and unless the

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latter part of the section had been complied with. We shall therefore construe the first part of section 950 according to its evident intended meaning, and hold that it applies only to stock belonging to the owner or one in possession of land along or through which the railroad passes, which has been killed or maimed by the engines or cars of the company upon that part of its road, said road being unfenced, or insufficiently fenced. The complaint does not bring this case within the purview of the section so construed. It does not allege the ownership or possession of any land along or through which the railroad runs to be in the plaintiff, or that the stock was killed at such place. These allegations are essential to a sufficient complaint under this section. *Baker v. So. Cal. Ry. Co.*, 114 Cal. 501, 46 Pac. 604; *Baker v. So. Cal. Ry. Co.*, 126 Cal. 516, 58 Pac. 1055; *Boyd v. So. Cal. Ry. Co.*, 126 Cal. 571, 58 Pac. 1046.

2. The complaint shows that the stock was killed at Beaudin's Spur. The answer avers that Beaudin's Spur is a public station or depot, and used as such. No replication was filed to this answer, and therefore these allegations must be taken as true. This being the case, no duty devolved upon the railroad company to fence the railroad at that point. *Baker v. So. Cal. Ry. Co.*, *supra*; *Moses v. S. P. R. R. (Or.)* 23 Pac. 498; *Lloyd v. Pac. R. R.*, 49 Mo. 199; *Morris v. St. L., K. C. & N. R. R.*, 58 Mo. 78; *Swearingen v. M., K. & T. R. R.*, 64 Mo. 73; *Kyser v. K. C., St. J. & C. B. R. Co.*, 56 Iowa, 207, 9 N. W. 133, and cases cited. No allegation of defendant's negligence in the operation of its trains is necessary to render it liable under section 950. We need not consider whether the complaint contains general allegations of negligence sufficient to constitute a cause of action, because the proof was barren of all negligence on the part of defendant.

3. The evidence introduced at the trial and incorporated in the record by way of bill of exceptions does not support the verdict and judgment. There is a complete want of proof of any negligence on the part of defendant. There is no evidence as to whether the animals were killed or maimed by the engines or cars of the railroad company. The only evidence contained in the record in that regard is that the animals were found near the track, one dead and the other maimed so that it had to be killed. No showing is made as to the character of injuries to either of the animals, except that one had its legs broken. All of this may have occurred from some other causes as well as from being struck by an engine or train. Whether the one killed or the injury to the other was caused by defendant's engine or cars was directly in issue under the pleadings, and the burden of establishing the allegations of the complaint was upon plaintiff. The mere finding of the bodies near the railway track is not of itself sufficient proof that they were killed by the engine or cars of

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the railway company. U. P. R. R. v. Bullis (Colo. App.) 39 Pac. 897. The evidence is entirely wanting in several other important particulars which are not necessary to discuss. Want of evidence to support the judgment may be relied upon and considered upon an appeal from the judgment. Ball v. Gussenhoven (Mont.) 74 Pac. 871, and cases cited. Counsel for respondent insists that the record does not contain all the evidence given on the trial. We are clearly of the opinion that the recitals contained in the bill of exceptions and the certificate of the judge settling the same are sufficient to disclose that it contains all, or the substance of all, the evidence given at the trial bearing upon the errors alleged.

There are other defects in the complaint and proof which require no notice.

We are therefore of the opinion that the complaint does not state facts sufficient to constitute a cause of action under section 950 of the Civil Code, and that the verdict is not supported by the evidence. The judgment must therefore be reversed, and we so advise.

POORMAN and CALLAWAY, CC., concur.

PER CURIAM. For the reason stated in the foregoing opinion, the judgment is reversed, and the cause remanded.

CLEMENT v. PERE MARQUETTE R. CO.

(Supreme Court of Michigan, Oct. 18, 1904.)

[100 N. W. Rep. 999.]

Killing Stock on Track—Failure to Fence—Cattleguards—Variance.

In an action against a railroad company for killing horses on its track, the negligence alleged being that defendant failed to maintain the statutory fence, and, it being averred that the horses entered on the track over the line where the fence should have been, plaintiff cannot recover if it appears that the horses entered over cattle guards, and defendant may show that they did so enter.

Sufficiency of Fence—Authority of Railroad Commission.

Under Pub. Acts 1889, p. 187, No. 165 (Comp. Laws, § 6294), requiring railroads to construct cattle guards, and providing that any cattle guard which shall have the written approval and indorsement of the railroad commissioner shall be a legal cattle guard, the sufficiency of a cattle guard of a kind prescribed in writing by the commissioner, and which is in good condition and repair, may not be questioned.

Error to Circuit Court, Kalkaska County; Clyde C. Chittenden, Judge.

Action by Elisha Clement against the Pere Marquette Railroad Company. Judgment for plaintiff.

Defendant brings error. Reversed.

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Frederick W. Stevens (Charles McPherson, of counsel), for appellant.

Wayne Simmons (Parm C. Gilbert, of counsel), for appellee.

HOOKER, J. Defendant, a railway company, has appealed from a judgment rendered against it in an action for negligently killing two horses owned by the plaintiff. The declaration charges negligence consisting of a failure to erect and maintain the statutory fences upon the line of defendant's railway, and that plaintiff's horses strayed and went upon the defendant's right of way at a place where such fences were required, and were struck and killed by defendant's locomotive. By way of defense the defendant introduced proof that the horses entered by passing over the cattle guards, which were such cattle guards as had been prescribed by the Commissioner of Railroads in compliance with the statute, and that they were at the time in good condition and repair; their being a claim, and perhaps evidence tending to show, that these cattle guards were adequate as against most horses and cattle. Counsel for the plaintiff maintains that the only questions before the jury were: First. Did the defendant maintain lawful fences? Second. Were the horses killed upon defendant's right of way by its locomotive? He says that the defendant had no right to bring into the case the question whether the horses were killed upon the highway, or crossed the cattle guard to get upon the track. We think counsel has overlooked the necessity of proving that the injury resulted from defendant's failure to fence, and that, therefore, it was competent for defendant to show that the horses did not go upon the track across a part of the line that should have been fenced. To make out his case it was necessary to prove such an entry upon the right of way as he had alleged. Proof by the plaintiff that they came over the cattle guard would have been a variance, and such proof for the defendant tended to disprove the charge. In charging the jury the judge said that they might find for the plaintiff, although the horses were found to have entered over the cattle guard, and not by reason of the absence of the statutory fence, provided they found that the cattle guard was not in good condition, or was not a good and sufficient cattle guard, which would turn back and restrain stock under ordinary circumstances. He also said: "It is a question of fact in this case whether the cattle guard was in good repair. If it was not in good condition and of the proper pattern, and if the horses of the plaintiff went upon the right of way of defendant and were killed by reason of such defect, then the plaintiff is entitled to recover, and your verdict will be for the value of said horses." The statute (Act No. 165, p. 187, Pub. Acts 1889; Com. Laws, § 6294) contains a requirement for fences and cattle guards, and contains the following pro-

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viso: "Provided that any fence or cattle guard which shall have the written approval and endorsement of the Commissioner of Railroads of this state, and which fence is not less than four and one half feet in height, and is otherwise equal in durability, strength and sufficiency to turn animals and stock to the fences herein prescribed, shall be a legal railroad fence or cattle guard." The record shows that the cattle guard was of a kind prescribed in writing by the Commissioner of Railroads, and it is said that there was uncontradicted evidence that it was in good repair and condition. If that is true, it was error to leave to the jury the question of its condition and repair in the language used; but, in any event, it was error to instruct the jury that it might find the defendant liable if, in their opinion, the evidence showed that (although in good condition and repair) it was not good and sufficient, or would not turn back and restrain cattle under ordinary circumstances. The law precludes such an inquiry, for it provides that the action of the commissioner is conclusive upon that question. See *La Flamme v. Det. R. Co.*, 109 Mich. 511, 67 N. W. 556. It was also error to permit evidence on the part of the plaintiff that cattle guards of that pattern, in good condition and repair, would not ordinarily turn cattle and horses.

The judgment is reversed, and a new trial ordered. The other Justices concurred.

CHICAGO UNION TRACTION CO. v. O'DONNELL.

(Supreme Court of Illinois, Oct. 24, 1904.)

[71 N. E. Rep. 1015.]

Appeal—Review.

A defendant does not waive his right to have reviewed the action of the trial court in refusing a peremptory instruction because it is offered at the close of all the evidence, or because after its refusal he requests instructions as to the law of the case.

Same—Same—Findings.

Where there is any evidence to establish a fact as found by the Appellate Court, the finding is binding on the Supreme Court.

Accident on Street Car Track—Contributory Negligence—Question for Jury.

In an action against a street railway company for the death of a pedestrian struck by a car, a witness testified that he saw decedent walking on the street; that just as he reached the car line the witness heard the gong of a street car, and instantly the car, going at the rate of 12 or 15 miles an hour, struck decedent down; that the witness went to the car, which had stopped, and found decedent dead under the car. The proof tended to show that decedent had almost cleared the track when he was struck, and that no warning of the approach of the car was given: *held*, that the question of the decedent's contributory negligence was for the jury.

Appeal from Appellate Court, First District.

Action by P. H. O'Donnell, administrator of William

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Julius, deceased, against the Chicago Union Traction Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

John A. Rose (W. W. Gurley, of counsel), for appellant.
Kickham Scanlan, for appellee.

HAND, J. This is an action on the case, brought by the appellee against the appellant, in the circuit court of Cook county, to recover damages for the death of William Julius, his intestate. The declaration contained four counts, the first and second of which alleged that on the 23d day of September, 1900, at the intersection of Peoria and Van Buren streets, in the city of Chicago, while said intestate was crossing the tracks of the defendant on Van Buren street with due care for his own safety, the defendant so negligently ran and operated a street car under its control that it struck said Julius, by means whereof he was thrown down and the car passed over his body and he was killed. The third count charged the defendant with wantonly running over said Julius, and the fourth with a failure to sound a gong. The general issue was filed, and a trial before the court and a jury resulted in a verdict and judgment for \$3,780, which has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

The accident occurred at 2:30 a. m. on Sunday, September 23, 1900. The evidence for the plaintiff tended to prove that Julius, while walking across Van Buren street from the north, on the east side of Peoria street, was struck by a west-bound Van Buren street electric car going at the rate of 12 or 15 miles an hour, and was knocked down, run over, and killed. The defendant, at the close of all the evidence, made a motion to instruct the jury to find in its favor, and presented to the court an instruction to that effect. The court declined to so instruct the jury, and the action of the court in that regard is the only assignment of error urged as a ground for reversal in this court.

It is contended by the appellee that the record in this case is so framed that the appellant cannot raise that question here, as it is said it waived its right to insist upon a review thereof, as it failed to make its motion at the close of the plaintiff's evidence, and requested the court to give to the jury instructions involving a determination of facts by the jury after its motion had been overruled. It has been held that if a defendant introduce evidence after a motion to peremptorily instruct the jury in his favor has been overruled, unless he renew his motion at the close of all the evidence, or if he fail to offer an instruction with his motion, or if he submit a peremptory instruction with a series of instructions, he thereby waives, upon appeal or writ of error, his right to raise objection to the action of the trial court in refusing to peremptorily instruct in his favor. It has, how-

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ever, never been held that a defendant waived his right to have reviewed the action of the trial court in refusing a peremptory instruction because it was offered for the first time at the close of all the evidence, or because after its refusal the defendant requested the court to instruct the jury generally as to the law of the case; but the practice is otherwise, as appears from many reported cases, among which are the cases of *Illinois Central Railroad Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358; *West Chicago Street Railroad Co. v. Liderman*, 187 Ill. 463, 58 N. E. 367, 52 L. R. A. 655, 79 Am. St. Rep. 226; *North Chicago Street Railroad Co. v. Cossar*, 203 Ill. 608, 68 N. E. 88.

It is contended by the appellant that the court should have peremptorily instructed the jury to find in favor of the defendant, as it is said the evidence fails to show that Julius was in the exercise of due care for his own safety at the time of the accident. The question thus raised is one of fact, and, if there is any evidence in the record tending to establish due care upon the part of the deceased at the time of the accident, the finding of the Appellate Court upon that question is binding upon this court and cannot be disturbed. The witness McDonald, who was the only person called by the plaintiff who witnessed the accident, testified that Julius was walking south upon Peoria street at an ordinary gait; that witness was going in the same direction, some 75 feet in his rear; that before he reached Van Buren street he started to cross Peoria street diagonally, intending to go to a saloon located at the northwest corner of Peoria and Van Buren streets; that there was an electric light near the corner, and that his view was unobstructed; that just as Julius reached the car line on Van Buren street he heard the ccong of a street car sound, and instantly saw the car, which was going at the rate of 12 or 15 miles an hour, strike Julius and knock him down; that he went to the car, which had stopped upon the west line of Peoria street, found Julius beneath the car, where he remained until the wrecker came, and the car was jacked up, and the dead body of Julius was removed from beneath the car. We think the evidence of this witness fairly tends to support the verdict of the jury.

It is urged that, as the deceased apparently walked upon the tracks without stopping to look or listen for an approaching car, his conduct amounted in law to contributory negligence, and should bar a recovery. The question of whether Julius was guilty of contributory negligence was a question of fact, which was properly left to the jury. The proof tends to show that Julius had almost cleared the track when he was struck, that the car approached the street crossing at a high rate of speed, and that no warning of its approach was given. It was for the jury to say whether, under all the circumstances in proof, the conduct of the deceased was such,

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at the time he was injured, as to bar the plaintiff from a right to recover by reason of his negligence. *Chicago & Alton Railroad Co. v. Lewandowski*, 190 Ill. 301, 60 N. E. 497.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CHICAGO CITY RY. CO. v. UHTER.

(Supreme Court of Illinois, Oct. 24, 1904.)

[72 N. E. Rep. 195.]

Release of Claim—Fraud—Remedies.

Where one signing a release is induced to do so by a fraudulent representation, but understands what he is signing, in order to make an attack on the release resort must be had to equity.

Same—Same—Same.

Where one signing a release is deceived into signing it by the belief that he is signing something else, he may attack the instrument in an action at law.

Same—Same—Question for Jury.

Where, in an action for personal injuries, there was evidence that plaintiff signed a release under the belief that he was signing a receipt for something else, the question whether the release was obtained unfairly was for the jury.

Personal Injuries—Evidence.

In an action for injuries where one defense was that prior to the accident plaintiff had met with other accidents, which had caused many of the ailments attributed to the accident in question, it was error to permit plaintiff to introduce the testimony of witnesses as to what they had heard about prior injuries to plaintiff.

Evidence—Estoppel.

Where evidence was introduced by plaintiff over objection, and defendant thereafter introduced evidence of the same character, he was not thereby precluded from questioning the correctness of the ruling on plaintiff's evidence.

Accident on Street Railway Track—Evidence—Arrest of Conductor and Motorman.

In an action against a street railway for injuries sustained by having been struck by one of defendant's cars, it was error to admit on behalf of plaintiff evidence showing that a policeman arrested the motorman and conductor several hours after the accident.

Impeaching Witness.

A party had no right on cross-examination of a witness to examine him as to his relations with his wife, and as to whether he supported his family.

Appeal from Appellate Court, First District.

Action by Henry Uhter against the Chicago City Railway Company. From a judgment of the Appellate Court affirming a judgment in favor of plaintiff, defendant appeals. Reversed.

This is an action on the case, brought on May 18, 1895, by the appellee against the appellant company to recover damages for personal injuries claimed to have been received by appellee on December 31, 1894, by being struck by one of

appellant's electric street railway cars at or near the intersection of Sixty-Third street and Madison avenue in the city of Chicago. The ad damnum was laid at \$25,000. The plea of the general issue was filed, and the case has been tried three times. In the first two trials the juries were unable to agree. The last jury rendered a verdict in favor of appellee for \$12,500, of which the trial judge required a remittitur of \$8,500, and judgment was entered against appellant for \$4,000. Upon appeal to the Appellate Court the latter judgment has been affirmed, and the present appeal is prosecuted from such judgment of affirmance.

William J. Hynes and Watson J. Ferry (Mason B. Star-ring, of counsel), for appellant.

George W. Plummer, Wharton Plummer, and S. C. Dwyer, for appellee.

MAGRUDER, J. In the present action to recover damages on account of personal injuries the usual questions whether or not the plaintiff below was in the exercise of due care for his own safety when the accident occurred, and whether or not the defendant was guilty of such negligence as caused the accident, were not the only questions involved upon the trial of the case, but there was also presented for the determination of the jury, upon the trial below, the question whether or not a certain release executed by the appellee some five days after the accident occurred was valid and binding upon the appellee. The release was in writing, and was signed by the appellee by his mark, and was witnessed by two witnesses, one of whom was his daughter, and the other of whom was his granddaughter. The instrument, by its terms, released the appellant from all demands, and especially from any claim on account of the accident in question, and recited that it was in consideration of \$35, paid to the appellee, and of an agreement to send a certain physician to attend upon him, such physician not to make more than four visits.

There are two kinds of fraud for which such a release as was here introduced in evidence may be impeached. Where a party, signing such an instrument is induced to execute it by a misrepresentation or fraudulent representations as to collateral matters, or as to the nature and value of the consideration, resort must be had to a court of equity for relief. In such cases the party fully understands what he is signing, and is aware of the nature and character of the instrument executed by him, but is deceived by fraudulent representations as to facts outside of the instrument itself. There is another kind of fraud, however, for which a release may be impeached, and that is fraud which inheres in the execution of the instrument; that is to say, where the signer of the instrument is deceived into signing it by the belief that he is signing something other than that which he does really sign.

Cases of this kind arise where the instrument is misread to the party signing, or where there is a surreptitious substitution of one paper for another, or where, by some trick or device, a party is made to sign an instrument which he did not intend to execute; and, where this is the case, the nature of the instrument signed is not fully understood by the party signing it. Where fraud of the latter kind exists—that is, fraud in the execution of the instrument itself—it may be shown in an action at law. *Papke v. Hammond Co.*, 192 Ill. 631, 61 N. E. 910.

In the case at bar it was charged by the appellee that when he signed the instrument introduced in evidence as a release he did not know that he was signing such a release, but supposed he was signing a receipt for money which he had paid out to a doctor for medical services in dressing his wounds and caring for his injuries. The evidence tends to show that the appellee, or some member of his family, had paid out about \$30 to a doctor for these services when the representative of the appellant company approached him with the view of securing the release in question, and he supposed, when he executed the release, that he was merely executing a receipt for such money, paid out by him to the physician, and returned to him by the appellant's representative. There was evidence in the record tending to establish appellee's contention that he did not execute the release, and that he signed it under the belief that he was signing a receipt. Whether or not such a release was obtained unfairly is a question of fact for the jury. *Illinois Central Railroad Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *Chicago, Rock Island & Pacific Railway Co. v. Lewis*, 109 Ill. 120; *National Syrup Co. v. Carlson*, 155 Ill. 210, 40 N. E. 492; *Indiana, Decatur & Western Railway Co. v. Fowler*, 201 Ill. 152, 66 N. E. 394, 94 Am. St. Rep. 158. But while it is true that sufficient evidence was introduced, attacking the validity of the release, to justify the submission of the question of its execution to the jury, yet we are of the opinion that serious errors were committed by the trial court in the admission of testimony bearing upon other questions presented by the record. Even if the release was not understandingly executed as such by the appellee, yet the questions remained whether or not the negligence of the appellant company caused the injury while appellee was in the exercise of due care, and whether or not the injuries suffered by him were such as they were claimed to be, and were of the character sought to be established by appellee's testimony.

1. One of the questions in the case was whether certain ailments of the appellee, to which many of his witnesses testified, and certain sufferings endured by him after he received the injuries in question, were really caused by such injuries, or existed before the accident, or were due to causes operating before the accident occurred.

For instance, the medical testimony showed that after the accident appellee showed signs of rheumatism and rupture, and indications of serious fractures in his limbs. Undoubtedly the injury was a very serious one, and the appellee at the time of its occurrence was an old man 70 years of age. Whether the physical ailments suffered by the appellee after the accident were really caused by it or not was a question about which the testimony was conflicting. Appellant introduced testimony upon the trial tending to show that many of the physical troubles which appellee's witnesses attributed to the accident had existed prior thereto. But before such testimony was introduced upon the last trial by the appellant, the appellee, evidently in anticipation that such testimony would be produced when the appellant should begin to make its defense, introduced much of its own testimony upon this subject, not in rebuttal, but as a part of its original case. Appellee placed upon the witness stand a witness by the name of Hull, and a part of his examination was as follows: "Q. Did you ever hear of his having rheumatism? (Objected to by counsel for defendant as incompetent; objection overruled; exception by defendant.) A. No, I never did. Q. Did you ever hear of him having a rupture of any kind, or know of his having any? (Objected to by counsel for defendant for the same reason; objection overruled; exception by defendant.) A. No, sir. * * * Q. Did you ever hear of him being kicked by a horse? (By counsel for appellant, the same objection as before.) * * * A. Before this injury, I never saw him walk lame." Again, a witness by the name of Love was put upon the stand by the appellee, and the following is a part of his testimony: "Q. Did you ever hear of his being ruptured, having a rupture? (Objected to by counsel for defendant as incompetent; objection overruled; exception by defendant.) A. No, sir. Q. Did you ever hear of any thing being the matter with him until the time of this accident? (Same objection by defendant; objection overruled; exception by defendant.) A. No, I think not. He cut his foot one time in the woods. I heard that years ago. That is all I ever heard." Appellee in rebuttal also placed on the witness stand a witness by the name of Northrup, and the following is a part of his testimony: "Q. Did you hear of his having his arm broken? (Objected to by counsel for defendant as incompetent; objection overruled; exception by defendant.) A. No, sir." This evidence should not have been admitted, because it was mere hearsay, and was, therefore, prejudicial to the appellant company. One of its defenses as to the character and extent of appellee's injuries was that prior to the accident in question he had met with a series of other accidents, in one of which the arm which he claimed to have been injured in the accident in question was fractured; in another of which his leg was broken, and that he had sustained a rupture; and in

another of which he had cut his foot; and that he had also been afflicted with rheumatism in the arm claimed to have been injured by the present accident. These witnesses were not asked to state what they knew as to the character of the appellee's injuries or ailments prior to the accident, but as to what they had heard in reference thereto.

In *Treschman v. Treschman*, 28 Ind. App. 206, 61 N. E. 961, which was an action by an infant against her stepmother for personal injuries, evidence that it was the general repute in the neighborhood that the weakness of the plaintiff's eyes was caused from measles, and that plaintiff's mother told witness in the presence of plaintiff, then two years old, that plaintiff had had the measles, and that it had caused her eyes to become weak, was properly rejected as hearsay; and the court there said: "The court excluded certain offered testimony of a witness to the effect that it was the general repute in the neighborhood that the weakness of appellee's eyes was caused from measles; also by the same witness that the appellee's mother had told witness that appellee's eyes were weak from measles; also the offered testimony of a witness that appellee's mother told witness in the presence of appellee, then two years old, that the appellee had the measles, and that it had caused her eyes to become weak. As to part of this offered testimony, counsel for appellant have given no sufficient reason why it should be excepted from the general rule excluding hearsay evidence. What the appellee's mother told the witnesses was certainly properly excluded. It is true that hearsay evidence is admissible in certain cases. But it is admitted only through necessity, as to prove pedigree, age, place of birth, and the like. But it is not admissible to prove the existence of a physical fact. Whether or not appellee's eyes were weak from some prior disease could be established by positive testimony." So, in the case at bar, whether or not appellee's ailments in the nature of rheumatism and rupture and fractures were due to the accident in question or to prior injuries or sickness could be established by positive testimony without the resort to such hearsay evidence.

2. It is claimed, however, by the appellee, that when the appellant introduced its testimony to sustain its defense it asked some of its witnesses questions of the same character; that is to say, whether or not they had ever heard that the appellee had suffered from any of the disabilities or ailments mentioned prior to the accident. It seems to be contended that because the appellant, following the ruling of the trial court in favor of the plaintiff below upon this subject, introduced in its own behalf such hearsay evidence, it thereby waived the right to question the correctness of the trial court's ruling upon this subject upon appeal in a court of review. Such is not the law.

In *Richardson v. Webster City*, 111 Iowa, 430, 82 N. W.

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921, the trial court had ruled that certain questions asked of the witnesses as to the amount of damage suffered by the plaintiff were improper as calling for the conclusions of the witnesses, and thereby usurping the province of the jury, and it was claimed by counsel for plaintiff in the reviewing court that the defendant could not complain of such error because it had asked similar questions of its own witnesses; but it was there held that an appellant is not precluded from taking advantage of exceptions taken to incompetent testimony, although he has introduced similar testimony in his own behalf; the Supreme Court of Iowa there saying: "It is said by counsel for plaintiff that similar questions were asked by defendant of its witness. This does not prevent it from taking advantage of the exceptions it has preserved."

In *San Antonio & Aransas Pass Railway Co. v. De Ham*, 54 S. W. 396 (Court of Civil Appeals of Texas, June 29, 1899), it is said by the court: "It is contended, however, that after the admission of the objectionable evidence defendant also offered proof upon the matter, and is therefore estopped to complain. We do not think this contention sound. A defendant has the right to meet the plaintiff's case as made under the rulings of the trial judge, and, after making objection and reserving proper exceptions, may combat the testimony of plaintiff, whether correctly admitted or not, without losing his rights on appeal."

In *Horres v. Chemical Co.*, 57 S. C. 192, 35 S. E. 501, 52 L. R. A. 36, it was said by the court: "But the respondent contends that, inasmuch as the defendant, after the ruling of the circuit judge by which the testimony of plaintiff was allowed as competent, offered similar testimony, therefore defendant has waived his objection to such testimony. * * * It cannot be good law that, after a party has excepted to the ruling of the presiding judge admitting incompetent testimony (which ruling is the law of the case on that trial in the circuit court), the exceptor is prevented from cross-examining plaintiff's witness on the matter excepted to, or in offering testimony in his own interest on the same line." In the latter case it was distinctly held that the appellant does not waive his right to except on appeal to testimony, admitted over his objection, by offering testimony in his own behalf in reply on the same line.

In *Washington, etc., Co. v. McCormick*, 19 Ind. App. 664, 49 N. E. 1086, it was held that, where a party objects to the admission of evidence, and afterwards introduces evidence of the same character in rebuttal thereof, he does not thereby waive his objection; the court there saying: "After the court had held, over appellant's objection, that the evidence was competent, and had permitted appellee, who had the burden, to introduce such evidence to maintain his case, appellant, in seeking to overcome the case made by appellee, could follow the theory laid down by the court without impliedly ad-

mitting the court's theory to be right, and without waiving his right to question the court's action."

3. The deposition of a policeman named Finnegan was taken by the appellant before the trial, and was read upon the trial to prove certain facts in regard to the occurrence of the accident. The policeman witnessed the accident, and saw the car when it struck appellee and knocked him down, and testified as to what he saw, and did. Upon the cross-examination of Finnegan the appellee asked him certain questions, which called out the fact that he took the motorman and conductor of the train of cars which caused the injury into his charge; or, in other words, arrested them. The questions calling out the fact of the arrest of the motorman and conductor were objected to at the time they were asked of the witness when the deposition was taken, and were also objected to at the trial before the answers were read to the jury. A motion was also made by counsel for appellant that the answers be stricken out. But the motion was denied, and the answers were read to the jury.

This evidence in regard to the arrest was improperly admitted by the trial court. There was no charge of willful and wanton conduct on the part of the motorman and conductor in the declaration, but only a charge of ordinary negligence on the part of the company. The admission of this evidence tended to make the impression upon the minds of the jury that the motorman and conductor had been guilty of committing an act which was criminal in its nature; and as the verdict of the jury, before its reduction by a remittitur, was \$12,500, it may be that the jury came to the conclusion, in view of this evidence, that they had a right to award punitive damages. The theory upon which the introduction of this testimony is sought to be justified is that the officer's act in making the arrest was a part of the *res gestæ*. It cannot be so regarded. The appellee, after receiving the injuries in question, was taken to a doctor's office and examined, and was there quite a long time, and after he had been there several hours was taken to his daughter's house, distant several miles from the place where the accident occurred. The arrest in question was made, or the motorman and conductor were taken in charge by the policeman, at the same time when appellee was taken from the doctor's office, near the place where the accident occurred, to his daughter's house. Inasmuch as the arrest was made several hours after the accident happened, it cannot be regarded as a part of the *res gestæ*. An act or declaration can only be considered as a part of the *res gestæ* when it illustrates, explains, or interprets other parts of the transaction of which it is itself a part. *Chicago West Division Railway Co. v. Becker*, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144. In *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713, where it was held that a certain act was not a part of the *res gestæ* because

it took place some time after the accident occurred, we said: "That which occurs before or after the act is done is not a part of the *res gestæ*, although the interval of separation is very brief." See, also, *Montag v. People*, 141 Ill. 75, 30 N. E. 337. Greenleaf, in his work on Evidence (vol. 1, § 108), says upon this subject: "The principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." This precise question arose in *Luby v. Hudson River Railroad Co.*, 17 N. Y. 131, which was an action for damages, where the plaintiff was struck by one of the defendant's cars while crossing a street in the city of New York, and on the trial evidence was allowed to be given by a police officer, against the objection of defendant, that he arrested the driver of the car; and it was there held that the fact of the arrest was irrelevant, and may have improperly influenced the jury in their judgment; the Court of Appeals of New York there saying: "That fact was irrelevant to the case, and we cannot tell what influence it may have had upon the minds of the jury. It is true that the jury ought not to attach any importance to the circumstance in trying the issue before them, but this only proves that this fact ought not to have been shown for their consideration. It certainly has some tendency to prove that at the very time of the transaction the defendant's driver was considered by the officer and others as guilty of culpable negligence. The question of his negligence was in issue and on trial, and how far the jury were aided in their conclusion by the manner in which the driver was treated by a police officer, or others who witnessed or were near the transaction, it is impossible for us to say. There is no pretense for saying that this evidence was necessary or proper for the purpose of identifying the occasion."

4. Appellant placed upon the witness stand a witness by the name of Stewart from Lowell, Ind., where the appellee lived, for the purpose of establishing certain facts tending to show that the sickness and ailments of the appellee existed before the accident. At a subsequent stage in the trial appellee introduced testimony for the purpose of impeaching the witness Stewart. But before the impeaching testimony was gone into the appellee, upon the cross-examination of Stewart, asked him certain questions as to his past life, and his relations to his family, and his moral character. A part of such cross-examination was as follows: "I have lived with Mrs. Metcalf twenty-one years. Q. Are you a married man? A. A married man? I was one; yes, sir; and I presume I am yet. My family live in Pennsylvania. Q. Did you run away from your family? (Objected to by counsel for defendant; objection overruled; exception by defendant.) A. No, sir; I did not. I have letters from them every once in a while

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now. My wife is living. It is twenty-six years, I think, since I lived with my family. I have a son and a daughter. The daughter is married, and the son was on the man-of-war Montgomery in the Spanish war. He was a machinist by trade. Q. Since you came away have you supported your family at all? (Objected to by counsel for defendant; objection overruled; exception by defendant.) A. No, sir." This cross-examination was improper. The appellee had a right to cross-examine the witness Stewart in any such way as to show his want of truthfulness if he was not a truthful man, but it was not material or proper to show his delinquencies in any other direction. It had a tendency to prejudice the minds of the jury against the witness to go into his private relations and the condition of his domestic affairs. It was immaterial whether those relations were pleasant or not, or whether he supported his family or not. The only matters connected with the character of the witness, with which the jury had any concern, or which had any proper place in the progress of the trial, were those only which affected the truth or falsity of his testimony. In *Atwood v. Impson*, 20 N. J. Eq. 157, the chancellor said in reference to testimony attacking the character of a witness: "No one witness swears that he knows his general character for truth and veracity. They have heard something against him, mostly as to his character for other matters beside truth and veracity, and evidently have heard them from persons who referred to particular transactions. This is not the evidence which the law permits, or should permit, to affect the credibility of a witness. With many, telling the truth is a habit and a principle which they adhere to always, though they may indulge in drinking, swearing, gambling, roystering, or making close bargains. With others, lying is the habit or principle, and if elevated to be senators or legislators, or made church members or deacons, it does not always reform them. The object of the law is to show the character of the witness as to telling the truth. General reputation in the community where he is known is the test, and the only test, which the law allows as to character."

For the errors above indicated in the admission of irrelevant, incompetent, and improper evidence, the judgments of the Appellate Court and the circuit court of Cook county are reversed, and the cause is remanded to the latter court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

WALGER *v.* JERSEY CITY, H. & P. ST. RY. CO.

(Supreme Court of New Jersey, Nov. 7, 1904.)

[59 Atl. Rep. 14.]

Passengers—Negligence—Question for Jury.

In an action against a carrier for injuries sustained by a passenger by his being run into by a car while transferring from one car to another, *held*, that the question of the carrier's negligence was one for the jury.

Same—Contributory Negligence—Question for Jury.

In an action against a carrier for injuries sustained by a passenger by his being run into by a car while transferring from one car to another, *held*, that the question of his contributory negligence was one for the jury.

Same—Who Are—Transfer Point.*

The relation of passenger and carrier continues while the passenger is transferring from one car to another, he having been furnished a ticket enabling him to do so.

Action by Ludwig Walger against the Jersey City, Hoboken & Paterson Street Railway Company. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

Argued June term 1904, before GUMMERE, C. J., and GARRISON, GARRETSON, and SWAYZE, JJ.

Bedle, Edwards & Thompson, for plaintiff in error.

Alexander Simpson, for defendant in error.

GUMMERE, C. J. This case comes before us on the defendant's writ of error. The grounds relied on for a reversal of the judgment are the refusal of the trial judge to nonsuit, and the refusal to charge a certain request submitted on behalf of the defendant.

The plaintiff was a passenger upon one of the defendant company's cars. He disembarked from that car for the purpose of transferring to another car of the company, a ticket enabling him to do so having been furnished him on the car upon which he first took passage. The point at which he alighted was the proper transfer point. After getting off the car, and as he was about to cross over to the other car, or while he was doing so, the car which he had left started to go around what is described in the case as "the loop," and its rear end struck him, knocked him down, and injured him. According to the plaintiff's story, the accident happened immediately after he got off of the car, and before he had taken a single step away from it. In this situation of the case, it was manifestly proper for the trial judge to refuse to nonsuit.

The request to charge submitted by the defendant, and re-

*As to who are, and are not, passengers, see foot-note appended to *Radley v. Columbia Southern Ry. Co. (Ore.)*, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153, where all the preceding authorities in this series are collected or referred to.

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fused by the trial court, was as follows: "If the plaintiff, after leaving the car, walked along the track by the side of a closed car (that is, the car which he had just left) some ten or more feet, and was struck by the rear end of the car rounding a curve at a low rate of speed, there can be no recovery by the plaintiff." This request could only properly have been charged upon the assumption that the defendant company, under the facts stated, was not guilty of the breach of any duty which it owed to the plaintiff, or that, under those facts, the plaintiff was guilty of contributory negligence. But neither of these questions were for the determination of the court. The plaintiff was still a passenger of the plaintiff company when he was struck. If he was taking the most direct course from the car which he had just left to the car upon which he was about to embark, it was for the jury to say whether he was not entitled to believe that he was safe in doing this, or, at least, that he would not be put in jeopardy by anything done by the company while taking this most direct route. It was also for the jury to say whether the operation of the car, under the conditions disclosed by the request to charge, was not negligent operation, and a violation of the duty which the defendant owed to the plaintiff as its passenger.

The judgment should be affirmed.

CHICAGO & N. W. RY. CO. v. O'BRIEN.

(Circuit Court of Appeals, Eighth Circuit, September 5, 1904.)

[132 Fed. Rep. 593.]

Railroads—Relation to Employee of Express Company—Contract for Carriage.*

An express messenger, while riding in a car furnished by a railroad company to the express company by which he is employed, under a contract by which the employees therein are carried free, occupies a relation to the railroad company analogous to that of one of its own employees, and the care which such company owes him in respect of its tracks, engine, cars, and the operation of its train is measured by that which it owes to those in its immediate service.

Same—Liability for Negligence in Operation—Iowa Statute.

The statute of Iowa (Code, § 2071) providing that railroad companies shall be liable for all damages sustained by any person, including

*For authorities in this series on the subject of the relation of express messengers to railroad companies, see *Peterson v. Chicago & N. W. Ry. Co.* (Wis.), 9 R. R. R. 286, 32 Am. & Eng. R. Cas., N. S., 286 (not contrary to public policy to limit liability for results of ordinary negligence to express messengers); foot-notes appended to *Feldschneider v. Chicago, etc., Ry. Co.* (Wis.), 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737; foot-note appended to *Long v. Lehigh Valley R. Co.* (C. C. A.), 12 R. R. R. 508, 35 Am. & Eng. R. Cas., N. S., 508; foot-note appended to *Wells-Fargo & Co. v.* Page (Tex. Civ. App.), 4 R. R. R. 568, 27 Am. & Eng. R. Cas., N. S., 568; *Missouri, K. & T. Ry. Co. of Texas v. Reasor* (Tex. Civ. App.),

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employees, in consequence of the negligence of other employees connected with the use and operation of their roads, and that no contract which restricts such liability shall be legal or binding, does not alter the character of the relation between a railroad company and a person injured, nor the rules of evidence appropriate to such relation upon an issue as to negligence.

Master and Servant—Action for Injury of Servant—Evidence of Negligence.†

In an action against a railroad company to recover for the injury or killing of an employee, or one occupying a like relation to the company, in a wreck caused by the derailment of a train, the fact of the accident is not evidence of negligence on the part of the defendant or its employees to sustain the burden of proof resting on the plaintiff.

Thayer, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

See 116 Fed. 502.

On August 1, 1899, J. J. O'Brien, an express messenger in the service of the American Express Company, was fatally injured by the derailment and wreck near Boone, Iowa, of a fast mail train of the Chicago & Northwestern Railway Company. Mary O'Brien, as the administratrix of his estate, brought an action against the railway company under the provisions of the Iowa statute extending a right of action to personal representatives in cases of death caused by negligent or wrongful act. At the time of his employment O'Brien contracted with the express company to assume the risk of all accidents and injuries sustained in the course of his employment through negligence in the operation of any railroad, whether resulting in death or otherwise, and to indemnify and hold the express company harmless from any demand that might be made against it on account of any claim or recovery because of his injury or death; and he authorized the express company to contract in his behalf with any railroad company upon which he was being or was to be transported as an express messenger that neither he, nor any one claiming under him as personal representative or otherwise, would make any claim for compensation because of injury sustained while in the employment of the express company and resulting from the negligence of the railroad company, its employees, or otherwise. Subsequently the express company and the railway company entered into a contract whereby the former, for a stipulated consideration, acquired the right to use the railroad lines of the latter in the transportation of express matter. Pursuant thereto the railway company furnished cars adapted to the conduct of

3 R. R. R. 281, 26 Am. & Eng. R. Cas., N. S., 281; foot-note appended to *Radley v. Columbia Southern Ry. Co. (Ore.)*, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153, where authorities on the question whether express messengers are passengers are referred to.

†See foot-note appended to *Land v. Southern Ry. (S. Car.)*, 9 R. R. R. 155, 32 Am. & Eng. R. Cas., N. S., 155, where all the preceding authorities in this series are collected.

the express business. It was agreed between them that employees of the express company should accompany the express matter upon the trains, have charge thereof, and that they should be transported free by the railway company. It was also agreed that the express company should protect and hold the railway company harmless from all liability that the latter might be under to the employees of the former resulting in any manner whatever, while they were being so transported. These contracts were in force, so far as they lawfully could be, at the time of the accident and the death of the deceased. A statute of Iowa in force at the time provided that "every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents or by any mismanagement of the engineers or other employees when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." Code, § 2071. In the petition of the administratrix many defects in the track, engine, and cars were alleged as causes of the accident. The evidence at the trial failed to support any of those allegations, and the Circuit Court withdrew them from the consideration of the jury. It was also alleged in the petition that an efficient cause of the accident was an excessive and dangerous rate of speed of the train considering that it was upon a down grade and upon a sharp curve at the bottom thereof. The issue arising from a denial of this allegation was the only one submitted to the jury. The jury determined the issue in favor of the administratrix, and, a judgment having been accordingly entered, the railway company prosecuted its proceeding in error to this court. It is claimed by the administratrix that the verdict of the jury is supported (1) by the evidence of two witnesses who testified to the rate of speed at the time of the accident; (2) by the condition of the wreck as it was discovered to exist immediately after the accident; and (3) by a presumption of negligence which arose from the fact of the accident itself. The two witnesses were Robert Bowles and Job D. Clark. They claim to have seen the train from the bank of a stream between a quarter and a half mile away from the railroad. Between them and the railroad track there was a field of corn six or eight feet in height, and more or less of timber and willows which fringed the stream. The accident occurred shortly after 5 o'clock in the morning. The presence of the two witnesses was accounted for by the fact that they had been fishing during the night. One of them was on top of the bank, which was quite high, and the other further down, nearer the water. Each of them testified that he had previously observed the movements of trains, and could tell the rate of speed. Each testified that

immediately before the derailment the train was moving about ninety miles an hour. Bowles said his attention was attracted by the loud and unusual noise made by the approaching train; that the train was in his view two or three seconds before it left the track; that a train moving ninety miles an hour would move one-ninth of a mile in a second; also, that if a train was running at the rate of ninety miles an hour, it would make about two-thirds of a mile in a minute; that he had frequently seen the trains upon the railroad track; and he added, "And it is upon my knowledge and mere curiosity as given here that I think this train was moving ninety miles an hour." The witness Clark said that his attention was attracted to the train by "the louder noise; more distinct than usual; more rapid"; that he thought it was going considerably faster than it commonly did, and that it did not slow up at the curve. When asked what he meant by "faster than common" he replied: "By the roar and the clink of the wheels at the end of the rails. It makes a big difference. That's where I get my rapidity." When asked where he got his idea of the speed, he said: "I hadn't no speed there. I simply got the sound. I didn't try to get any speed when I was down fishing." And being asked how he undertook to say that the train was going faster than it went before, he answered: "By the noise. I heard an extra noise from what it generally made—roar and sissing noise. * * * I have no particular knowledge of my own how fast that train was making that morning." After stating that in his best judgment the train was moving 85 or 90 miles an hour, the following occurred upon recross-examination: "Q. How do you make your judgment at that rate of speed? A. Seen foot races. I have run them myself. Q. And that is the way you make it up? A. By foot races. Q. How long would it take you to run a mile now? A. I don't know. Q. How many feet have you got in a mile? A. About 365 feet." The train consisted of an engine, an express car, two mail cars, and a storage car. The engine was badly wrecked. The express car was demolished, and portions of the train and objects therefrom were thrown from the right of way into and across a highway contiguous thereto and into a field adjoining the highway. The schedule rate of speed of the train was 45 miles per hour.

Upon the part of the railway company it was shown that the train left Boone on time at 5 o'clock in the morning. It was due to reach Moingona, 5½ miles to the westward, seven minutes later. This was and had been the schedule time of the train. The conductor of the wrecked train testified that he did not notice that it was going any faster than usual, and he was corroborated in this by other employees upon the train. He also said that there was no necessity for an increase of speed, as the train was on time; that the derailment took place about 4½ miles west of Boone,

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and that some one picked up and handed him the watch of the engineer, which had stopped at 5 minutes and 45 seconds after 5 o'clock; that he and the engineer had compared time before they left Boone, and their watches agreed within three or four seconds. He also said that he had theretofore made the run with a freight train down the hill from Boone to Moingona in five minutes, and, although the schedule gave them seven minutes, he had made the run 15 or 20 times in five minutes with the same fast mail train when they were late.

He was corroborated in this particular by a locomotive engineer who had previously made the run with special and passenger trains in five minutes—a speed of 66 miles an hour. A roadmaster of the company testified that there had never been any accident or derailment at the curve before or since. The trainmaster of the division west of Boone testified that he considered it safe to make the run from Boone to Moingona at a speed of 70 or 80 miles an hour, considering the condition of the track; and that it would be impossible to tell the rate of speed from the sound the train was making. There was some impeaching evidence of declarations of the conductor and one of the brakemen as to the speed on the morning in question, which may have affected the value of their testimony.

The railway company requested the Circuit Court to instruct the jury that they should not regard the fact of derailment as evidence of negligence on its part. The court declined to give the instruction, and nothing is found in its charge to the jury which fairly embodies the doctrine therein expressed. Counsel for the administratrix in their brief in this court contend that "the accident itself affords reasonable evidence, in the absence of explanation, that it happened from want of care," and that "the presumption of negligence, having once arisen, remains until overcome by countervailing proof."

D. E. Lyon (George T. Lyon, on the brief), for plaintiff in error.

R. M. Wright (P. F. Nugent and Healy Bros. & Kelleher, on the brief), for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The deceased did not, while upon the train in the performance of his duties as an express messenger, sustain to the railway company the relation of a passenger, and he was not, therefore, entitled to that highest possible degree of care to which a common carrier is held for the safety of those who have paid for their transportation as passengers. Neither was the express messenger a mere licensee. He was

not upon the train at the mere sufferance of the railway company, but he was engaged thereon in the performance of duties which had connection with its business of transportation, and which would naturally have been performed by its own employees had it not been otherwise arranged by contract with the express company. His relation to the railway company was analogous to that of one of its own employees. *Railway Company v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560. The measure of care which the railway company owed him in respect of its track, engine, cars, and the operation of its train was the same which it owed to those in its immediate service.

The derailment of the train, the injury to the express messenger, and his death occurred in the state of Iowa. The contracts between the express company and the deceased and between the express company and the railway company, in so far as they provided for the immunity of the latter from all liability to him for the result of its negligence, are contrary to the public policy of that state as expressed in the act of its Legislature. But this statute, while avoiding those provisions of the contracts, did not alter the character of the relation between the railway company and the deceased, nor the rules of evidence appropriate thereto.

The testimony of the witnesses Bowles and Clark should have been, as it doubtless was, laid aside by the jury as not being entitled to serious consideration. Not much more, if any, value can be attached to the condition of the wreck as evidence of the speed of the train at the time of its derailment. We are aware of no standard of comparison which would have enabled the jury to say that the quantum of demolition resulting from the derailment of the train on a downgrade, on an embankment, and at a sharp curve, was such that it was presumably going at a speed in excess of its usual and schedule rate. It is doubtful that there is any common knowledge upon such subject which would justify an inference having the probative force of evidence that the condition described in the record would not have resulted from a speed of 45 miles per hour or less. But, however this may be, it is obvious that it was of great importance to the railway company that the jury be instructed that the fact of derailment of the train did not in itself raise a presumption of negligence for which it was chargeable. Such an instruction was requested, and it was refused by the Circuit Court. It is familiar doctrine that in cases between employee and employer the law does not presume carelessness or negligence on the part of the latter. And the presumption in the case before us is that due care was exercised by the company in respect of the condition of the engine, cars, and railroad track, and also that those in charge of the operation of the train performed their duty. No logical distinction can be made in the application of this presumption of performance

of duty between the mechanical condition of the engine and cars on the one hand and the operation of the train upon the other. The burden of proof is upon him who asserts that the employer was negligent. This burden cannot be discharged by mere proof of the occurrence of the accident. To hold otherwise would be to ignore the well-established and long-settled difference between the rules which govern in passenger cases and those which apply when the relation is that of employer and employee. The doctrine *res ipsa loquitur* is not applicable in cases of the latter character.

In *Patton v. Texas & Pacific Railway Company*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, the court said:

"That while, in the case of a passenger, the fact of an accident carries with it a presumption of negligence on the part of the carrier—a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely—a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employee is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

In *Texas & Pacific Railway Company v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, a foreman in charge of a switch engine was injured by the explosion of another engine with which he had nothing to do. The Supreme Court approved of the charge of the trial court which embodied the rule "that the mere fact that an injury is received by a servant in consequence of an explosion will not entitle him to a recovery, but he must, besides the fact of the explosion, show that it resulted from the failure of the master to exercise ordinary care either in selecting such engine or in keeping it in reasonably safe repair."

In *O'Connor v. Ry. Co.*, 83 Iowa, 105, 48 N. W. 1002, the court said that "the mere happening of the derailment or the accident would not show negligence"; citing *Baldwin v. Railway Co.*, 68 Iowa, 37, 25 N. W. 918; *Case v. Railway Co.*, 64 Iowa, 762, 21 N. W. 30; *Gandy v. Railway Co.*, 30 Iowa, 420, 6 Am. Rep. 682.

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In *Bowen v. Ry. Co.*, 95 Mo. 268, 8 S. W. 230, the court said:

"As between master and servant, the mere fact that an appliance proves to be defective, and the servant is injured, does not make out a prima facie case for the servant of negligence on the part of the master."

In *Brymer v. Railway Co.*, 90 Cal. 497, 27 Pac. 371, an instruction was asked which embodied a clause that "the mere fact that an accident occurred by which the plaintiff was injured does not fix the liability, or even raise a presumption that the defendant was at fault in providing machinery or appliances for the labor in which the plaintiff was engaged." Its refusal was held to be sufficient cause for a new trial.

In *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613, a steam boiler exploded, injuring an employee of the owner, and it was held that the mere happening of the accident was not evidence of negligence.

In *Wormell v. Railroad Co.*, 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321, the court said:

"There is no presumption of negligence on the part of the defendant from the fact alone that an accident has happened, or that the plaintiff has received an injury while in the employment of the defendant."

In *Mining Co. v. Kitts*, 42 Mich. 41, 3 N. W. 240, an employee was injured by the fall of a bridge, the cause of which was unexplained. The court held that, while it might be guessed or surmised that there was negligence somewhere, it did not extend beyond conjecture, and that, if a master was to be held liable under such circumstances, the rule that an employee assumes the ordinary risks of his employment would be wholly done away with.

In *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338, the court said:

"The jury should not have been allowed to infer from the simple fact of the happening of the accident that there was negligence or unskillfulness on the part of the captain of the tug. That is justified by no decided case, and is in conflict with the well-established principle that it is incumbent upon the plaintiff in this class of cases to establish by affirmative proof that the injury received by him was caused by the negligent or unskillful act of the fellow servant."

In *Brownfield v. Railway Co.*, 107 Iowa, 254, 77 N. W. 1038, it was held that the rule *res ipsa loquitur* did not apply to a case where a locomotive fireman was injured by the derailment of an engine on which he was riding caused by a broken axle.

In *Grant v. Railroad Co.*, 133 N. Y. 659, 31 N. E. 220, an employee of the railroad company was injured by a defective drawhead. The court said that it may have been broken on account of a latent defect beyond the reach of inspection, and added:

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"Whether it did or not we do not know, and there is no evidence upon the subject. No facts are shown from which the cause of the accident can be more than guessed at. There is food for speculation or wonder, but there is no evidence as to the cause."

The same rule is announced in *Hodges v. Kimball*, 104 Fed. 745, 44 C. C. A. 193; *Bowes v. Hopkins*, 84 Fed. 767, 28 C. C. A. 524; *Peirce v. Kile*, 80 Fed. 865, 26 C. C. A. 201; *Railway Company v. Thompson*, 70 Fed. 944, 71 Fed. 531, 17 C. C. A. 524; *Whitcomb v. Railway Co.*, 125 Mich. 572, 84 N. W. 1072; *Higgins v. Fanning*, 195 Pa. 599, 46 Atl. 102; *Redmond v. Lumber Co.*, 96 Mich. 545, 55 N. W. 1004; *Railway Co. v. Cook's Adm'r*, 24 Ky. Law Rep. 2152, 73 S. W. 765; *Ouillet v. Overman Wheel Co.*, 162 Mass. 305, 38 N. E. 511; *Railroad Company v. Kellogg*, 55 Neb. 748, 76 N. W. 462.

If in this very case the derailment of the train had in fact been caused by some defect in the engine or cars beyond the reach of that ordinary diligence and care in selection and subsequent inspection which the railway company owed to the deceased—and there is no doubt but that such defects do at times exist—a presumption of negligence arising from the accident itself might naturally result in imposing upon the company a responsibility for an undiscoverable defect. Bearing in mind the relation of the express messenger to the company, and the rules of law which are applicable thereto, it is clear that it was entitled to the instruction requested, in order that it might be protected from such a contingency; and, not only that, but also because the fact of accident did not raise a presumption of excessive speed. The refusal of the trial court to give the instruction was erroneous.

The judgment of the circuit court will be reversed, and the cause remanded for a new trial.

THAYER, Circuit Judge, dissents.

PRATT v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts, Bristol, Nov. 22, 1904.)

[72 N. E. Rep. 328.]

Injury to Shipper's Employee—Contributory Negligence—Going between Rails.

Plaintiff, an employee of a shipper, desiring to load a freight car standing on a grade siding at a small country station, was furnished by defendant's agent with a bar to move one of the cars to the place where it was to be loaded, and while so engaged he was struck and injured by another car, which followed the car being moved down the grade without plaintiff's knowledge; there being at the time of the accident no other person in the neighborhood: *held*, that plaintiff was not guilty of contributory negligence, as a matter of law, in going between the rails while pushing the car.

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Same—Collision—Negligence—Cars on Siding—Failure to Set Brakes.

Where a railroad company left a car at the top of a grade siding without setting the brakes thereon, and, if the brakes had been set, the car could not have been moved even with a bar, but, by reason of defendant's failure to set the brakes, the car was caused to move down the grade by the blowing of a high wind, and struck the servant of a shipper while moving another car down the grade, defendant was negligent, though the first car in the string was held on the grade by brakes.

Exceptions from Superior Court, Bristol County; Loranus E. Hitchcock, Judge.

Action by William Pratt against the New York, New Haven & Hartford Railroad Company. From a judgment in favor of defendant, plaintiff brings exceptions. Sustained.

Perry, Jenney & Potter, for plaintiff.

F. S. Hall, for defendant.

LORING, J. The material evidence in this case was, in substance, as follows: The plaintiff was employed by one Porter to assist in loading box boards into a freight car on a spur track of the defendant railroad at Tremont, in this commonwealth. This spur track was used for loading freight cars, and butted upon an open space belonging to the defendant railroad, devoted by it to the deposit of goods to be loaded in such cars. On being told that he wished to move the two cars which were to be loaded to the place where the box boards were, Porter was furnished by the defendant with a bar with which to move the two cars. While the plaintiff, together with Porter and two other employees of his, was moving the car south, to be placed where the boards were, another car came down upon the plaintiff without warning. It was first seen by one of the other employees, who called to the plaintiff; but the car struck the plaintiff before he could get out of its way, while he was walking between the rails, pushing against the bunter of the car which was being moved. The car which ran the plaintiff down was standing by itself, six to ten feet further north than the car was which the plaintiff was in the act of moving before the moving of the last car was begun. It was in evidence that it was the practice for shippers to move cars to such place on this spur track as was convenient for loading the goods to be shipped. It was also in evidence that there was a grade in this spur track running down hill toward the south; that it was a grade which no one would be likely to see, unless looking for it; and that, if the brakes were set on a freight car, it could not be moved, even by an iron bar, down this grade. At the time of the accident there was a high wind from the north and no engine, no employees of the defendant, nor any one else near the car which ran the plaintiff down after it was left on the spur track earlier on the same day. The presiding judge directed the jury to render a verdict for the

defendant, and the case is here on an exception to that ruling.

The defendant seeks to support the ruling on two grounds: First, that there was no evidence of due care on the part of the plaintiff; and, second, that the cause of the accident was, on the evidence, a matter of conjecture, and no negligence on the defendant's part was shown. But we are of opinion that these contentions cannot be maintained.

1. The place in question was not a railroad yard, where cars were continually going back and forth. It was a single spur track, leading off the main line, devoted to loading freight cars, at what appears to be a small country station of the defendant railroad; and at the time of the accident there was neither any employee of the railroad, nor any other person, in the neighborhood. Under these circumstances, the plaintiff was not, as matter of law, lacking in due care in walking between the rails while pushing the car in question to the place where it was to be loaded at the invitation of the defendant. In the case at bar there was evidence that the plaintiff did not know that there was a grade in the track. For this reason the case does not come within such cases as *Jean v. Boston & Maine Railroad*, 181 Mass. 197, 63 N. E. 399; *Judge v. Elkins*, 183 Mass. 229, 66 N. E. 708; *Dyer v. Fitchburg Railroad*, 170 Mass. 148, 48 N. E. 1087; *Dolphin v. New York, New Haven & Hartford Railroad*, 182 Mass. 509, 65 N. E. 820—and also is to be distinguished from *Martyn v. New York & Boston Dispatch Express Co.*, 176 Mass. 401, 57 N. E. 671.

2. We are of opinion that the jury were warranted in inferring that the car which ran down onto the plaintiff, and which was left without the brake being set, was put in motion down grade by the high wind which was then blowing. The case comes within such cases as *Cox v. Central Vermont Railroad*, 170 Mass. 129, 49 N. E. 97, and not within such cases as *Kendall v. Boston*, 118 Mass. 234, and *Wadsworth v. Boston Elevated Railway*, 182 Mass. 572, 66 N. E. 421. We are also of opinion that to leave a car, with the brakes not set, at the top of a down grade on a spur track, on which it is the practice for shippers to move cars by hand, is an act of negligence. The only doubt we have had is this: The plaintiff testified that the brakes were set on the first car which Porter and his employees moved south on this spur track, that there were no brakes set on the second car brought down by them, and that Porter and his men let off the brakes on the first car when they brought it down. But if it be assumed that the setting of the brakes on the first car next to the grade was a sufficient protection against all the cars behind it running down grade, the defendant knew that there was a grade at this point, and it also knew the practice then existing for the local agent to leave it to shippers to move the cars to the desired place; and, know-

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ing this, it was negligent to leave this car at the top of the grade with the brakes not set, as against a shipper, or the employee of a shipper, who, from ignorance of the existence of the grade, might move the first car, and thus be exposed to the danger from which the plaintiff suffered.

Exceptions sustained.

RICE v. NEW YORK CENT. & H. R. R. CO.

(Supreme Judicial Court of Massachusetts, Worcester, Oct. 18, 1904.)

[72 N. E. Rep. 79.]

Carriers—Postal Clerks—Injuries—Contributory Negligence.

Postal cars were built with projecting planks surrounding the end doors so that the space between the same when coupled ordinarily was only 13 to 14 inches, which, during the impact in coupling with automatic couplers, was narrowed to only from 2 to 5 inches. Plaintiff, who had been a postal clerk for more than 10 years, and was familiar with the type of cars used and the management of the trains at a particular station, attempted to leave the car by the end door and squeeze himself between such planks, and as he did so was injured by being caught between the same as the cars were bumped together in changing locomotives: *held*, that plaintiff was guilty of such contributory negligence as precluded a recovery for his injuries.

Report from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Henry E. Rice against the New York Central & Hudson River Railroad Company. A verdict was directed in favor of defendant, and the case was reported to the Supreme Court. Judgment on verdict.

Plaintiff, a railway mail clerk, was injured by being squeezed between two mail cars while attempting to alight from a train of the defendant railroad at its station in Worcester. The plaintiff was on the train as one of the mail clerks, and, it being plaintiff's duty on the arrival of the train at a station where engines were changed to collect the mail from a nearby box in the station, he attempted to alight to perform such duty, and while doing so received the injuries complained of. The train was made up so that two mail cars were immediately back of the engine, then a Pullman baggage car, and behind that five or more Pullman sleeping cars. The car in which plaintiff was riding had two wide sliding doors on each side and at each end, doors which opened inward on hinges. Each mail car was equipped with a front and rear platform formed by the projection of the door frame about 12 inches beyond each end, but neither mail car had at either end a platform gate or rail of any sort. On each end of each mail car an upright plank projected on each side of the door molding and extended from the platform to the roof of the car. These planks were firmly fastened to the car about 1½ inches from

the curved molding which formed the side of the door. The cars were equipped with automatic couplers, and were so constructed that when engines were changed the space between the two upright planks might be narrowed at any time to a width of only from two to five inches by the impact of the cars. When the train arrived at the station plaintiff attempted to alight, when he was caught and injured between such upright planks during a change of engines.

Frank H. Stewart and Frank J. Gerry, for plaintiff.

Ralph A. Stewart and J. Francis Berry, for defendant.

BARKER, J. We assume that the plaintiff, as a postal clerk employed by the Post-Office Department of the general government upon the defendant's train, stood to the carrier in the general relation of a passenger, although that relation was modified to some degree by the circumstances that his position and movements in the postal cars and his leaving or returning to those cars, and the internal arrangement and use of those cars and of the appliances and utensils within them designed to facilitate the care and disposition of the mails, were not in the control of the defendant, but of the postal officials and employees. We assume also, without so deciding, that the presence in the train of postal cars of the construction described in the evidence, built without the usual outside end platforms, and having no platform gates as required by Rev. Laws, c. 111, § 214, was an infraction of that statutory requirement, and so some evidence of negligence on the part of the defendant. But we are of the opinion that the verdict properly was ordered for the defendant on the ground that the plaintiff himself was guilty of contributory negligence. He had been a railroad mail clerk for ten years on the same route, and for a year and a half in cars of the same type, and must be taken to have been entirely familiar with the method of managing the trains at the station, and with the construction of the cars, and with all possible modes of leaving or entering them. On each side of the mail cars were side doors with grab-irons and iron stirrups. The end doors of the mail cars were designed to afford a way of passing from the mail cars to the ordinary cars. The train was run with two locomotives, and the plaintiff knew that these were to be changed at the station, and he must be taken to have known that the changing of engines would involve the forcing nearer together of the two mail cars in the process of uncoupling and coupling the engines during the stoppage of the train. As the postal cars were built, leaving the train by the narrow opening between the two compelled the plaintiff to force his body through a space only 13 or 14 inches wide between two upright planks, and which space he must be taken to have known was liable to be narrowed at any instant, without warning, to a width of only 2 or 5 inches, when the two postal cars should be

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bumped together in the changing of locomotives. There was no unusual exigency, and no special demand for haste on the part of the plaintiff. To attempt to leave the train by forcing his body through the narrow space between the planks at a time when it was to be expected that the cars would be forced nearer together in the process of changing engines was negligence on the part of the plaintiff, contributing to his injury.

Judgment for defendant on the verdict.

STONE *v.* LEWISTON, B. & B. ST. RY.

(Supreme Judicial Court of Maine, Nov. 18, 1904.)

[59 Atl. Rep. 56.]

New Trial.

When the evidence is conflicting, and the question of liability and damages is one that is peculiarly within the province of the jury, and the evidence does not convince the court that the jury were clearly wrong, a motion for a new trial will be overruled.

Instructions.

A requested instruction, although proper, may be rightfully refused when the presiding justice has covered the whole ground of the instruction in his charge. He is not required to give it again.

Street Railways—Negligence—Evidence—Custom—Allowing Passengers to Ride on Running Board.*

In an action against a street railway company to recover damages for personal injuries received by the plaintiff's intestate, testimony is admissible upon the question of the negligence of the defendant to show that it was the custom of the defendant to permit passengers to ride on the running board of its cars, although there was no claim that this custom was known to the plaintiff's intestate.

Photographs as Evidence—Judicial Discretion—Exceptions.

Exceptions do not lie to the exclusion by the court of photographs. It is in the discretion of the presiding justice to admit or exclude photographs.

(Official.)

Exceptions from Supreme Judicial Court, Androscoggin County.

Action by Ellen G. Stone against the Lewiston, Bruns-

*For the authorities in this series on the subject of negligence in allowing passengers to ride in dangerous places, or otherwise to expose themselves to danger, see section IV of monograph, 4 R. R. R. 217, 27 Am. & Eng. R. Cas., N. S., 217; *Penny v. Atlantic Coast Line R. Co.* (N. Car.), 10 R. R. R. 606, 33 Am. & Eng. R. Cas., N. S., 606 (duty to warn alighting passenger of danger from disorderly persons who have just left train); *United Rys. & Elec. Co. of Baltimore v. Woodbridge* (Md.), 8 R. R. R. 156, 31 Am. & Eng. R. Cas., N. S., 156 (duty to warn passengers to keep seats where car stopped before reaching transfer point); *State v. Young* (N. J.), 10 R. R. R. 559, 33 Am. & Eng. R. Cas., N. S., 559 (negligence in permitting passenger to ride on front platform of street car); *North Chicago St. R. Co. v. Polkey* (Ill.), 8 R. R. R. 169, 31 Am. & Eng. R. Cas., N. S., 169 (not negligence, as matter of law, to permit street car passenger to ride on running board).

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wick & Bath Street Railway for negligently causing death of plaintiff's intestate. There was a verdict for the plaintiff for \$5,000. Defendant filed a motion for a new trial; also exceptions to the admission and exclusion of certain evidence and to the refusal of the presiding justice to give certain instructions. Overruled.

Argued before WISWELL, C. J., and WHITEHOUSE, POWERS, PEABODY, and SPEAR, JJ.

D. J. McGillicuddy and F. A. Morey, for plaintiff.
W. H. Newell and W. B. Skelton, for defendant.

SPEAR, J. This is an action on the case to recover damages for personal injuries received by the plaintiff's intestate, Richard Stone, while riding upon the defendant's car. The verdict was for the plaintiff in the sum of \$5,000. The case comes up on motion and exceptions.

The facts, upon which there is but little controversy, show that the plaintiff's intestate was a passenger on the defendant's car leaving Sabattus for Lewiston on August 10, 1902, at about 8:30 o'clock in the evening. It was an open car, with two running boards, and, there being more passengers upon the car than could be seated, the plaintiff's intestate rode upon one or both of these running boards, either sitting or standing, from Sabattus to the place of the accident, near the residence of Dr. Alonzo Garcelon, about a mile from the city of Lewiston. As the defendants state in their brief: "At the point where the accident is alleged to have taken place there was an elm tree standing upon the southerly or pole side of the track, at a distance of seven inches from the outer edge of the lower running board, fourteen inches from the outer edge of the upper running board, and twenty-two inches from the track of the car floor. The tree leaned somewhat away from the track. The lower running board is six and one-half inches in width and the upper running board is seven inches." The plaintiff's contention is that when near this elm tree Stone stood up, leaned in as if to speak to his wife, who was sitting in a seat in the car, and that when he leaned back he struck the elm tree, was knocked to the ground, fell under the car, was run over, and received injuries from which he died the next day. There was some dispute in regard to the manner of the accident, but one witness testified positively that it occurred as the plaintiff contended, and the jury must have so found, and their verdict upon this point must control. While the conductor avers that he said, "You will find room inside, and don't ride on the running board," it does not appear that Stone heard it, or was warned against the danger of trees or poles, but was allowed to ride upon the running board in the darkness without instructions or caution. It seems that on this evening there were some 10 or more passengers than could

be seated, and most of them were permitted and did ride on the running board. It also appears that it was the custom of the defendant to allow passengers to ride, between Lewiston and Sabattus, on the running board. The details of these facts, the question of due care on the part of the deceased, and a view by the jury of the track, the tree, and the car, showing the exact relation of the car to the tree, were all submitted to the jury with proper instructions, and they found the defendant liable; and a careful examination of the testimony does not convince us that they were so clearly wrong as to warrant us in setting the verdict aside upon the question of liability.

The defendant further contends that, admitting liability, the verdict is clearly excessive, and therefore erroneous. The verdict was a large one, but the suffering for which it was given was intense beyond description. It is clearly distinguishable from *Ramsdell v. Grady*, 97 Me. 319, 54 Atl. 763, cited by the defendant. In that case, as in the case at bar, "only such damages can be allowed as the deceased sustained in his lifetime." In the *Ramsdell Case* the plaintiff's intestate was already ill with diphtheria when the physician was called, and might have suffered and died even if the physician had diagnosed the case as diphtheritic; and the plaintiff's right to recover damages only includes "such injury, expense, and suffering as was due to the defendant's default in excess of what they would have been had the case been properly diagnosed and treated."

But in the case at bar the deceased's suffering and death were due not in part, but wholly, to the negligence of the defendant.

The evidence, which is almost too shocking to quote, shows that both of his limbs were so mangled and torn that they were merely hanging by shreds of flesh and muscle. This was at 9 o'clock in the evening. He suffered amputation of both legs, and lived under circumstances of the most excruciating physical and mental pain until between 2 and 3 o'clock the next morning. In addition to these injuries the pelvic bone was also broken. He was conscious nearly all the time, not only suffering great physical pain, but with a full realization of his hopeless condition.

We can hardly conceive of a case capable of involving keener mental suffering. He was a young man, less than 30, in the full vigor of life and health. He had been married a little over a year, and there had come into his life, as the result of this union, a little child, at this time about a month old. With the bride of a year and a helpless infant dependent upon him, in the vigor of youth, with a future bright in hope, he was yet fully aware that in a few hours his inevitable doom was death. One of the physicians says: "He looked up into my face and asked if I thought he could live, and I replied that I was very sorry to tell him that I did not

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think he could; and he made the remark that it was very hard to die, or something to that effect." We think this man suffered about all that man can suffer in this world, including death itself. We cannot say that the verdict is so excessive as to require us to set it aside.

The defendant's first exception was to the refusal of the presiding justice to give the following instructions upon the question of due care on the part of the plaintiff's intestate:

"If the jury shall find that the plaintiff's intestate voluntarily assumed the position in which he was riding, sitting upon the running board of the car, and bringing portions of his body outside the line of the car and running boards, when he could have ridden upon the rear or front platform of the car, taking into account the rate of speed at which the car was going, the darkness of the night, and the insecurity of the plaintiff's intestate's position on the running board, the jury have the right to consider all of these facts as bearing upon the question whether at the time and place of the accident the plaintiff's intestate was in the exercise of such care and prudence as an ordinarily careful and prudent person would exercise under like circumstances." But a careful reading of the charge discloses that the presiding justice did, in substance, give all the elements of the request. After having instructed the jury, without objection or exception, upon the question of fault on the part of the defendant, he proceeded as follows with respect to the duty devolving upon the plaintiff's intestate:

"If you find they were not at fault, then your verdict would be for the defendant. If you think they were in fault by running their cars too near the tree and the post, or so near as to endanger the passengers on the running board, and that they allowed passengers to ride upon the running board, and took fare for it, then you will come to the question whether or not Mr. Stone was in the exercise of such care as a prudent man would exercise, under the circumstances, for his own protection. If he was not, and that failure to exercise care contributed to the injury, then your verdict would be for the defendant; but if the defendant was in fault, as I have stated, and if Mr. Stone was in the exercise of due care, and if he was knocked off of the car by striking the tree or the post, and that was so near as to constitute a fault on the part of the company, then the plaintiff is entitled to recover." But the instructions upon this point did not stop here. The justice, in the last paragraph of his charge, gave the following: "I am asked to instruct you, gentlemen, that the burden of proof is upon the plaintiff to show by a fair preponderance of the evidence that at the time of the accident and injury to the plaintiff's intestate he (the plaintiff's intestate) was in the exercise of such care as a prudent man would have exercised under all the circumstances; and in determining this proposition the jury have the right to take

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into account the darkness of the night, the position which the plaintiff's intestate was sitting or standing upon the running board of the car at the time of the accident and injury to him, and the fact whether or not a prudent man would, under all the circumstances, have been riding upon the running board of the car at the time and place of the accident. I give you that, and I have practically given it all before."

The above instructions sufficiently covered the subject-matter of the defendant's request.

The defendant's second exception is to the admission of testimony tending to show that it was the custom of the defendant company to permit passengers to ride on or upon the running board of the cars between Sabattus and Lewiston, without any claim that this custom was known to the plaintiff's intestate. This evidence may have had but little weight, but it was competent upon the question of the negligence of the defendant company. If neither trees nor poles were near enough to the track to possibly come in contact with a passenger, however situated upon a passing car, it might not be negligence, with respect to these objects, to permit a person to ride on the running board without any warning. But, on the other hand, if trees or poles were situated so near to the track as to possibly come in contact with a person riding in any manner, upon the running board, it might become a matter of gross negligence to permit a passenger to so ride without caution.

The defendant's last exception is to the exclusion by the court of certain photographs showing, as the defendant claimed, "the tree in question, the track, the car on the track by the tree, and a man on the car in the position in which the testimony of the different witnesses tended to show that Stone was at the time of the accident. It is within the discretion of the presiding justice to admit or exclude a photograph. "Whether it is sufficiently verified, whether it appears to be fairly representative of the object portrayed, and whether it may be useful to the jury, are preliminary questions addressed to him, and his determination thereon is not open to exceptions." *Jameson v. Weld*, 93 Me. 354, 45 Atl. 299.

Motion and exceptions overruled.

RODMAN v. NORTH JERSEY ST. RY. CO. et al.

(Supreme Court of New Jersey, Nov. 7, 1904.)

[58 Atl. Rep. 1095.]

Carriers—Injury to Passengers—Evidence.*

Where the proofs are that a trolley car was driven past a barrel wagon moving in the opposite direction, that the wagon had project-

*As to the duties and liabilities of a carrier of passengers with respect to collisions, see monograph appended to *Frohriep v. Lake*

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ing sides, that the condition of the roadway was such that a lurch of the wagon might reasonably be anticipated, and that the space between the two vehicles at the time and place of passing was not sufficient to prevent the car from being struck, it was not error to refuse to nonsuit the plaintiff, or to deny a motion to direct a verdict for the defendant company.

(Syllabus by the Court.)

Error to Circuit Court, Hudson County.

Action by Ella Rodman against the North Jersey Street Railway Company and Charles G. Woelppers. Judgment for plaintiff. Defendants bring error. Affirmed.

Argued February term, 1904, before GUMMERE, C. J., and DIXON, GARRISON, and SWAYZE, JJ.

Vredenburg, Wall & Van Winkle, for plaintiff in error North Jersey Street Railway Company.

William S. Stuhr, for plaintiff in error Charles G. Woelppers.

Robert Carey, for defendant in error.

GARRISON, J. This is an action for personal injuries resulting to the plaintiff from a collision between a barrel wagon and a car of the North Jersey Street Railway Company, in which plaintiff was riding as a passenger. Suit was brought against the company as the owner of the car, and against Woelppers, as the master of the driver wagon.

At the time of the collision the car and the wagon were moving in opposite directions. The fact that they collided is conclusive proof that the degree of care adequate to prevent that result had not been exercised. Whether reasonable care would have prevented the collision was left to the jury. The master of the driver of the wagon has no grounds to complain of the submission of this question to the jury. On behalf of the defendant company it was contended that no negligence of its motorman had been shown, and hence that the trial court erred in refusing to nonsuit the plaintiff, or to direct a verdict for the defendant. The testimony was that the car was driven past the barrel wagon, both being in motion; that the wagon had flaring or projecting sides; that the condition of the roadway was such that a lurch or swerve of the wagon might reasonably have been anticipated; and that the space between the two vehicles at the time and place of passing was not sufficient to prevent the car from being struck, probably by an overhanging barrel. In this state of the proofs, it was certainly a permissible inference

Shore & M. S. Ry. Co. (Mich.), 4 R. R. R. 532, 27 Am. & Eng. R. Cas., N. S., 532; *Palmer v. Warren St. Ry. Co.* (Pa.), 10 R. R. R. 597, 33 Am. & Eng. R. Cas., N. S., 597 (not negligence, as matter of law, to run street cars towards each other on same track); *State v. Young* (N. J.), 10 R. R. R. 559, 33 Am. & Eng. R. Cas., N. S., 559 (not negligence for street railway to cross railroad at grade, although situation was dangerous; and precautions to be observed by electric railway at railroad crossing).

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that, if the car had been stopped, it would not have been struck. The drawing of this inference, as well as the application of the rule respecting reasonable care, is a jury function; hence the court did not err in denying the defendants' motions. The asseveration of counsel that, if the car had been stopped, the collision would not have been averted, rests upon no proof, and, regarded as an inference from the proofs, it is properly addressed to the jury. The judgment against the defendant company is affirmed.

The main contention of the other defendant is that he was not the owner of the wagon that bore his name, and hence not the master of the driver. This raised a question of fact. *Edgeworth v. Wood*, 58 N. J. Law, 463, 33 Atl. 940. There was conflicting testimony. The jury decided that the defendant was the owner and master. No question of law was involved. The judgment against Woelppers is also affirmed.

FLAHERTY v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Worcester, Oct. 18, 1904.)

[72 N. E. Rep. 66.]

Injury to Mother Assisting Children to Board Train—Alighting from Moving Car—Proximate Cause.*

The failure of the employees in charge of a train to assist children to board it at a station, necessitating their mother to assist them, if negligence was too remote to be the cause of the mother's injury, sustained while afterwards attempting to alight from the train while in motion.

Persons Assisting Passengers—Degree of Care—Alighting from Moving Trains.†

A person boarding a train to assist passengers to enter it is not entitled to the protection accorded a passenger, and if his attempt to leave the train while in motion contributed to his injury there can be no recovery.

Contributory Negligence—Alighting from Moving Train by Direction of Brakeman.‡

A mother boarded a train at a station to assist her children to take the train. She gave no notice to any employee in charge that she did not intend to become a passenger. Before she left the interior of the car the usual preparation for starting had been made, and when she came to the door of the car its platform gates were

*For the authorities in this series on the question as to what is, or is not, the proximate cause of an injury, see foot-note appended to *Haley v. St. Louis Transit Co.* (Mo.), 12 R. R. R. 142, 35 Am. & Eng. R. Cas., N. S., 142.

†As to the duties and liabilities of the carrier to persons assisting or accompanying its passengers, see foot-note appended to *Morrow v. Atlanta & C. Air Line Ry. Co.* (N. Car.), 10 R. R. R. 290, 33 Am. & Eng. R. Cas., N. S., 290, where all the preceding authorities in this series are collected; *Bishop v. Illinois Cent. R. Co.* (Ky.), 11 R. R. R. 328, 34 Am. & Eng. R. Cas., N. S., 328 (care due bystander assisting passenger at conductor's request).

‡As to whether it is contributory negligence to alight from a moving train or street car, see foot-note appended to *Southern Ry. Co. v. Bandy* (Ga.), 12 R. R. R. 736, 35 Am. & Eng. R. Cas., N. S., 736.

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closed, and a brakeman beckoned her to the next platform, and said, as he helped her down the steps, "It is all right, not going very fast; be careful:" *held*, that the circumstances which made it negligent on the part of the brakeman to act as he did were obvious, making it contributory negligence on her part to attempt to leave the train, precluding a recovery for injuries sustained.

Exceptions from Superior Court, Worcester County;
Daniel W. Bond, Judge.

Action by Katherine A. Flaherty against the Boston & Maine Railroad. There was a verdict for defendant, and plaintiff brings exceptions. Exceptions overruled.

C. E. Tupper, for plaintiff.

Chas. M. Thayer and Alex. H. Bullock, for defendant.

BARKER, J. While a train was stopped at a station the plaintiff entered a car. She had no ticket and did not intend to ride, but to help her two children, who took the train as passengers, and to place in the car a bag which was to go with the children. She was the last person other than the trainmen to get upon the train, and she gave no notice to any one that she did not intend to become a passenger. Before she left the interior of the car the usual preparations for starting the train had been made, if it was not then in motion. When she came out of the door of the car its platform gates had been closed, and she found, directly opposite her and with his hand on the gate, a brakeman, to whom she said, "I want to get off the train." By a gesture he invited her to the next platform, took hold of her elbow, and assisted her down the step, saying, "It is all right, not going very fast; be careful." As she stepped off the car, which was moving slowly, she fell and was hurt. The suit is to recover compensation for her injury. A verdict was ordered for the defendant, and the case is here upon her exception to that order.

Upon her own testimony she had done nothing up to the time when she appeared to the brakeman and told him that she wished to get off which could indicate to the trainmen that she intended to get off at that station. She contends that some servant of the defendant should have helped her in placing the children and the bag in the car. But she made no request for such aid, and the failure to render it, if a fault of the stationmen or the trainmen, was too remote to be in any sense the cause of her injury. We find no evidence of negligence in the starting of the train when it was set in motion, nor is it contended that there was any jolt or jerk. It is settled by *Lucas v. New Bedford & Taunton R. R. Co.*, 6 Gray, 64, 66 Am. Dec. 406, that she was not entitled to the rights of a passenger, or to any extraordinary care on the part of the defendant, and that if her attempt to leave the train while it was in motion was the cause of or contributed in any degree to the accident she cannot recover. But she

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contends that the action of the brakeman in beckoning her to the next platform, and in saying, as he helped her down the steps, "It is all right, not going very fast; be careful," was negligence on the part of the defendant. If it could be so found, the circumstances which made it negligence were obvious, and made it contributory negligence on her part to attempt to leave the train while it was in motion. *Lucas v. New Bedford & Taunton R. R. Co.*, *ubi supra*. Her relation to the defendant not being that of a passenger, she having made no request to have the train stopped, not having been ejected from it or injured until she stepped from it of her own choice, she cannot recover, even if the brakeman was negligent. There was no evidence which would justify a finding either that she acted under any misapprehension or compulsion, or that she was in a condition in which her conduct was not to be judged by the ordinary standard of care.

Exceptions overruled.

TOPP *v.* UNITED RYS. & ELECTRIC CO. OF BALTIMORE.

(Court of Appeals of Maryland, Nov. 17, 1904.)

[59 Atl. Rep. 52.]

Passengers—Safe Place to Alight—Degree of Care.*

A street railway company discharging its passengers on its private way is bound to the utmost degree of care in procuring a safe place for the passengers to alight.

Same—Same—Negligence.

In an action against a street railway company for injuries to a passenger while alighting from a car on the company's private way, evidence examined, and held sufficient to show that the company was negligent in failing to provide a safe place for the passenger to alight.

Contributory Negligence—Question for Jury.

The question of contributory negligence is for the jury, except in a case where the facts are undisputed, and where only one reasonable inference can be drawn therefrom.

Same—Degree of Care Required of Carrier.†

Carriers of passengers are held to the exercise of the highest degree of care consistent with their undertaking, but passengers are required to exercise ordinary care only.

*As to the carrier's duties with respect to the safety of stations, platforms, and other stopping places, see foot-note appended to *Matthieson v. Burlington, etc., Ry. Co. (Iowa)*, 12 R. R. R. 826, 35 Am. & Eng. R. Cas., N. S., 826.

As to the care due alighting passengers, see foot-note appended to *Ellis v. Chicago, M. & St. P. Ry. Co. (Wis.)*, 12 R. R. R. 122, 35 Am. & Eng. R. Cas., N. S., 122.

†As to the degree of care required of a carrier of passengers, see foot-note appended to *Johnson v. Seattle Electric Co. (Wash.)*, 12 R. R. R. 786 35 Am. & Eng. R. Cas., N. S., 786; foot-notes appended to *Fithh v. Mason City & C. L. Traction Co. (Iowa)*, 12 R. R. R. 451, 35 Am. & Eng. R. Cas., N. S., 451; foot-note appended to *Howell v. Lansing City Electric Ry. Co. (Mich.)*, 12 R. R. R. 61, 35 Am. & Eng. R. Cas., N. S., 61.

Topp v. United Rys. & Electric Co**Same—Contributory Negligence—Alighting from Street Car—Evidence.**

In determining the question of the contributory negligence of a passenger alighting from a street car on the company's private way, the fact of the conductor stopping the car for the passenger to alight must be considered.

Same—Invitation to Alight—Sufficiency of Evidence.

On the issue whether a street car conductor invited a passenger to alight at a place where the car stopped on the company's private way, evidence held to show that the conductor invited the passenger to alight.

Same—Contributory Negligence—Alighting from Car.

In an action against a street railway company for injuries sustained by a passenger while alighting from a car on the company's private way, evidence held not to show contributory negligence precluding a recovery.

Appeal from Court of Common Pleas; Henry Stockbridge, Judge.

Action by Gorgianna Topp against the United Railways & Electric Company of Baltimore. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

**Thos. G. Hayes and J. Milton Lyell, for appellant.
Reuben C. Foster, for appellee.**

PEARCE, J. This suit was brought by the appellant to recover for personal injuries sustained by her while a passenger upon a car of the appellee. The only testimony in the case was her own and that of her son. She testified that when she entered the cars she gave her transfer ticket to the conductor, and told him she wished to leave the car at the platform in the rear of the fourth cottage on Chelsea Terrace, where her son and his wife lived; that the defendant company owned and used a private road or way for its tracks and cars running from Clifton avenue to the Windsor Mills Road, in the rear of the cottages on Chelsea Terrace, and that, when the car was about to turn into this way, the conductor asked her at which cottage she wished to alight, and she replied, "At the fourth;" that, as the car approached the platform used by passengers for that cottage, she rose and stood until the car stopped, but it did not stop at that platform, nor until it had passed a second platform, used by passengers for other cottages farther up the terrace, and stopped at a point where there was no platform; that the conductor was not paying attention when the car approached the first platform, and did not ring the bell to stop until the car had passed both platforms; that the car was a summer car, with a footboard on the side, and was standing perfectly still when she attempted to alight; that she had never been carried beyond the first platform before, though she had frequently alighted there, and that she did not know the ground beyond the platform, but that the conductor was looking

directly at her when he rang the bell to stop, and when she stepped on the running board to alight, and gave her no warning not to do so; that the ground where the car stopped was covered with tall weeds and grass, and looked perfectly safe to alight from the car, but when she stepped down from the running board, while holding onto the car handle with her left hand, her foot could not reach the ground, and she was thrown violently down a declivity concealed by the grass and weeds, wrenching and spraining her wrist, and bruising her body badly. This was on July 22d, and she was confined to the house until August 25th, and continues to suffer so much with her hand that she is unable to attend to her household duties. Her son testified that there are 11 cottages on Chelsea Terrace, in the rear of which the cars run upon the defendant's private property; that there was a platform in rear of the fourth cottage, in which he lived, and another platform in rear of the sixth cottage, each with five steps down to the ground; that he did not know by whom these platforms were provided, but that all the conductors and passengers on these cars recognized them as platforms for receiving and discharging passengers from and to these cottages; that he went with his mother the same afternoon to the place where she said she fell, and subsequently measured the slope of the declivity, and the perpendicular height of the track above the base of the declivity; that the slope was over six feet, and abrupt, and the track was four feet eight inches above the base of the slope; that the appearance of the place was very deceptive, being covered with a dense growth of weeds and long grass, so that it was impossible for any one not familiar with the ground to perceive any danger in stepping from the car. At the close of plaintiff's testimony the court granted the following prayers offered by the defendant: "(1) The defendant prays the court to instruct the jury that there is no evidence in this cause legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendant. (2) The court instructs the jury that, from the uncontradicted evidence in the case, the plaintiff was guilty of negligence directly contributing to the accident complained of, and therefore their verdict must be for defendant." A verdict for defendant was accordingly rendered, and judgment was entered upon the verdict. The only exception was to the ruling on these prayers.

Upon the question of the defendant's negligence, the argument of the appellee was based chiefly upon the contention that a street railway is not liable, as a carrier, to the passenger for the condition of the street upon which he alights. This is undoubtedly correct, as a general proposition, though there are cases where it becomes the duty of the street railway to warn its passengers of the unsafe condition of a street, known to those in charge of its car, but unknown or

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not plainly discoverable to the passenger, and to assist the passenger in alighting. Here, however, at the place of this accident, the railway was not upon a city street, but upon its own private right of way—a fact which at once broadly discriminates the present case from all those relied on by the appellee, and which effectually deprives it of recourse to the exemption from liability above mentioned. Two of the cases cited by the appellee state very clearly the reason for the rule invoked by it, and no less clearly indicate the circumstances in which it cannot be applied. In *Scanlon v. Philadelphia Transit Co.* (Pa.) 57 Atl. 521, where a verdict was directed for defendant, the court said: "This car was running upon the public highway, over which, it must be remembered, the defendant company has no control. In laying its tracks it must conform to the established grade. It can neither construct nor alter any of the places at which passengers are to step on or off cars. * * * Passengers leaving the cars must step upon the surface of the street in the condition in which it is placed by the city, which fixes and maintains the grades. * * * Obviously the rules which may reasonably apply to steam railroads owning their own right of way, and having complete control of the approaches thereto, cannot reasonably be applied to street railways, which have not the right of eminent domain, and are only allowed the use of the highways in common with other vehicles." In *Creamer v. West End Railway*, 156 Mass. 321, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456, where a similar verdict was directed, the court said: "But when a common carrier has the exclusive occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may properly be held that persons intending to take passage upon or leave a car have the relation and rights of passengers in leaving or approaching cars at stations." Where, as in the case before us, the street railway owns and controls the place where the accident occurs, and has either constructed or adopted platforms provided for the regular receipt and discharge of passengers, the reason for the rule as to such places ceases, and the rule must cease to operate as to such. We can perceive no reason, upon principle, why, as to the place of this accident, this defendant should not be held to the same liability, as regards a passenger, as a steam railroad, and this conclusion necessarily follows from the two cases last cited. The case of *Bigelow v. West End Railway*, 161 Mass. 393, 37 N. E. 367, so much relied on by the appellee, was the case of an accident in alighting upon a public street undergoing repair, and thereby rendered unsafe. It may therefore be eliminated from our consideration. For the same reason we may dismiss the argument of the appellee when he says: "The construction of the platform made alighting from the car a little more convenient, but it did not render dangerous the stopping of

the car at other places on the embankment, when that stopping had not been dangerous before the platform was built." The embankment being on the property of the defendant and under its control, it would have been an unsafe and dangerous place to let passengers off, if no platform had ever been constructed or adopted by the defendant for that purpose. The same rule, under the facts of this case, in our opinion, is applicable to the defendant as would be applied to a steam railroad owning its right of way. There can be no question what this rule is. It is firmly established that the relation of passenger does not cease upon the arrival of a train at the passenger's destination, but continues until he is afforded an opportunity safely to alight. This has been emphatically declared in this state in *P., W. & B. R. R. v. Anderson*, 72 Md. 526, 20 Atl. 3, 8 L. R. A. 673, 20 Am. St. Rep. 483, where this court said: "They [carriers of passengers] are bound to use the utmost degree of care, skill, and diligence in everything that concerns the safety of passengers; nor are their duties limited to mere transportation of them. They are bound to provide safe and convenient modes of access to their trains, and of departure from them." This duty has been variously stated elsewhere. In *Gaynor v. Old Colony R. R.*, 100 Mass. 208, 97 Am. Dec. 96, it was said: "The passenger is entitled to the exercise of the utmost care and diligence in providing against those injuries which can be avoided by human foresight, not only while on the cars, but while on the premises of the defendant." In *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713, the company was held "to the highest degree of care and skill reasonably practicable in providing a safe passage from the train"; and in *St. Louis, A. & T. Ry. Co. v. Finley*, 79 Tex. 85, 15 S. W. 266, it was said, "The company owed the passenger the duty of exercising the highest degree of care in enabling her to make the descent in safety." But it would be idle to multiply illustrations of this rule. When, therefore, this defendant entered into the occupation of its own right of way, under its own exclusive control, it subjected itself, as respects the receipt and discharge of passengers upon that right of way, to the duty imposed by the rule stated. It might have required passengers for Chelsea Terrace to get on and off at the intersection of that Terrace with Clifton avenue, thus alighting upon the public street, if unwilling to assume the burden of that rule, but it did not do this. If it had undertaken to receive and discharge passengers upon the embankment described, without any platform or other provision for their safety, it would have neglected the duty imposed by that rule. Having either constructed or adopted the platforms described in the testimony, it so far complied with that rule, since it cannot be material whether the company built or adopted the platforms; and it has been held that the adoption of a platform neither owned

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nor constructed by the company creates an implied contract that passengers may rely upon its use. *Haselton v. Portsmouth, K. & Y. St. Ry.*, 71 N. H. 589, 53 Atl. 1016; *Louisville & N. R. Co. v. Johnston*, 79 Ala. 436. The rule imposes the duty not only to provide, but to use, safe means of passage from the car. This the defendant did not do in this case, though twice informed that the plaintiff wished to alight at this first platform. Instead of stopping there, the conductor passed both platforms, and then stopped the car on this steep embankment, for the plaintiff to alight there. That this was negligence, we cannot doubt. In 5 A. & E. Enc. of Law, 574, it is said: "It is the duty of the conductor of a railroad train to stop its cars alongside the platforms at its stations, so that passengers may have a safe landing; and, if passengers are required to alight at any other point, the company is liable for an injury to them resulting thereby." In *Memphis & Charleston R. R. v. Whitfield*, 44 Miss. 481, 7 Am. Rep. 699, the court said: "In passing the platform, and requiring the passenger to alight, without assistance, in an unusual place, and without a safe spot to alight upon, the company was prima facie guilty of a neglect, which it was the province of the jury to characterize from the evidence, whether it were justifiable or excusable. Stopping the train at an unusual place rendered the company presumptively in the wrong to that extent, and the onus of explaining this neglect was thrown upon the defendants. A railroad company stopping its trains for passengers at a place so steep that they could not easily climb upon the train would be bound to assist them to do so, and most assuredly not less so to aid a passenger in alighting under similar circumstances." We have cited this passage at some length because the case is so closely analogous to that before us, but the principle there decided is the same decided in *United Railways v. Beidelman*, 95 Md. 483, 52 Atl. 914, and in *United Railways v. Woodbridge*, 97 Md. 633, 55 Atl. 445, in both of which was repeated the oft-declared rule that "proof of the occurrence of an accident and of injury to a passenger is prima facie evidence of negligence in the carrier, and throws upon him the onus of rebutting the presumption by proving there was no negligence on his part." In all these cases, as was said in *Benedick v. Potts*, 88 Md. 57, 40 Atl. 1069, 41 L. R. A. 478, "the inference of negligence arises, not from the injury to the passenger, but from the act that caused the injury," which in this case was the failure to stop at the platform. Thus explained and understood, no rule in the law of negligence is more firmly established. For these reasons, we think there was error in granting the defendant's first prayer.

The question of contributory negligence raised by defendant's second prayer remains to be considered. This question, like that of defendant's negligence, is primarily one for

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the jury. It is only in those cases where the material facts are undisputed, and where but one reasonable inference can be drawn from them, that either question can become a matter of law for determination by the court. *Jones v. United Railways*, 98 Md. —, 57 Atl. 620. But it is essential to remember that, while common carriers are held to the exercise of the highest degree of care consistent with their undertaking, passengers are required to exercise only ordinary care and prudence. In *Cooke v. Balt. Traction Co.*, 80 Md. 558, 31 Atl. 329, this court has said: "Where the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the court to determine its quality as matter of law." Among the surrounding circumstances of the present case, two may be specially mentioned: (1) The fact testified to that the appearance of the place was deceptive, the height and slope of the embankment being concealed by tall grass and weeds; and (2) the invitation to her to alight, implied by the conduct of the conductor. She testified that when she prepared to alight she looked down at the ground, which was covered with grass and weeds; that it looked perfectly safe; and that she would not have ventured out of the car if she had perceived or suspected danger. Her son testified that "there was a dense growth of weeds and long grass; that it was a very deceptive-looking place, and no one could see where they were stepping unless they knew all about the place." If she knew, or should have known in the exercise of ordinary care and prudence, that she was about to alight upon a steep slope, and that her foot, in stepping from the car, could not reach the ground, she would be negligent in taking this risk; but if, after looking as she says she did, she could reasonably believe she would alight upon a safe surface within reach of her foot in stepping down, she would not be negligent. While the conductor was negligent in not stopping at the platform, it would be unfair to him to assume that he knew she could not safely alight on the embankment, and recklessly permitted her to attempt it; and if he, an experienced employee of the railway, presumably familiar with the place, did not perceive danger in such attempt, it would surely not be reasonable to deny to a woman unacquainted with the place the benefit of the same presumption. In *Mayor v. Pendleton*, 15 Md. 12, where the appearance of a trench across the street was that of firm ground, and a horse was injured in attempting to pass over it, the owner was held free from contributory negligence. The essential question upon the testimony here is whether she saw, or, with ordinary care and prudence, should have seen, that she must step upon a steep declivity beyond the reach of her foot in

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the act of stepping down; and, under the circumstances of this case, a verdict of the jury is, in our judgment, the only proper mode of determining this essential fact. 5 A. & E. Enc. of Law, 652. Moreover, the implied invitation of the conductor to alight at that place cannot be overlooked in passing upon plaintiff's alleged negligence. This is a question of fact to be determined from the conductor's action and conduct, as well as from express words; and, without reciting the testimony again upon that point, we think it is clear she was so invited. *B. & O. R. R. v. Stumpf*, 97 Md. 78, 54 Atl. 978. It has been held in numerous cases that an invitation by one in charge of the train to alight at a place other than the station is held sufficient authority for the passenger to do so. *Foy v. London R. R. Co.*, 18 C. B. N. S. 225; *Raben v. Central Iowa R. R.*, 74 Iowa, 732, 34 N. W. 621; *Cartwright v. Chicago R. Co.*, 52 Mich. 606, 18 N. W. 380, 50 Am. Rep. 274; *Leveret v. Shreveport Belt R. R. (La.)* 34 South. 579. And this court has practically so held in *B. & O. R. R. v. Leapley*, 65 Md. 571, 4 Atl. 891. In *Cartwright v. Chicago R. R.*, supra, Chief Justice Cooley said: "Where a train stops at a platform, so that nothing but the forward end of the smoking car is at the platform, passengers in the cars—especially ladies—are not bound to go through the smoker to alight; and if, in consequence of the position of the train, they are injured in alighting, it is the fault of the company. * * * If a car in which there were passengers was not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance, give warning, or move the car to a suitable place. *Cockle v. London & S. E. Ry.*, L. R. 7 C. P. 321; *Pa. R. R. v. White*, 88 Pa. 327." We have cited this passage at length, not only because of the high authority of Judge Cooley, but because the facts of that case so closely resemble those of the present case. In the case cited "there was a road crossing at the place where the car stopped, and she thought the car stood where, if she stepped down, she would step upon the level road. She had several packages on her left arm, but her right hand was at liberty, and with that she took hold of the iron rod by the side of the steps. Instead of being on a level road, as she supposed, the end of the car was over a depression at the side of the road, and when her foot left the step she went down so far that her hold of the iron was broken, and she fell to the ground." Upon this state of facts, Judge Cooley added: "We also think that passengers, when not notified to the contrary, may rightfully assume that it is safe to alight from the car wherever it is stopped for passengers to leave it. * * * If she had the right to assume the landing place was safe, she was not negligent in stepping down as she did." We understand this to mean she was not negligent as matter of law, and, so understood, we concur in that decision. In line with that

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decision, and closely analogous with the facts of the present case, is that of *Fillingham v. St. Louis Transit Co.* (Mo.; St. Louis Ct. of App.) 77 S. W. 315. An electric car ran through a country district, past a platform provided for the use of passengers. There was a footboard along the side of the car, and plaintiff was permitted to alight, without assistance, from the car, at a place testified by her to be three or four feet, and by others twenty-two inches, below the footboard, where the ground was uneven; and it was held that "plaintiff was not guilty of contributory negligence, as matter of law, in stepping down, or in not demanding the return of the car to the platform, nor in relying on the judgment of the carmen, and their invitation to alight, unless the danger of alighting was so extreme and apparent as to deter a person of ordinary prudence." In *Richmond City Ry. Co. v. Scott*, 86 Va. 902, 11 S. E. 404, it was held that street railways are as much bound as steam railroads to warn passengers, about stepping down, of threatened danger; and in *Foss v. Boston & Maine R. R.* (N. H.) 21 Atl. 222, 11 L. R. A. 367, 49 Am. St. Rep. 607, it was expressly held by the Supreme Court of New Hampshire that the question of contributory negligence of a passenger in getting off a train which has gone past the station before stopping, where the place is a bad one to alight, is for the jury. To the same effect is *Joslyn v. Milford Street Railway*, 67 N. E. 866—a case almost identical with the present, recently decided by the Supreme Court of Massachusetts. An interesting collection and instructive review of the leading cases upon this subject will be found in *Nellis on Street Railway Accident Law*.

The judgment is reversed, with costs to the appellant above and below, and new trial awarded.

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(Supreme Court of Appeals of Virginia, Nov. 23, 1904.)

[48 S. E. Rep. 887.]

Carriers of Live Stock—Delay in Delivery—Right of Action.

A shipper of live stock cannot recover damages for delay in delivery of the stock where it is consigned in the name of shipper and he was not present to demand delivery, and delivery was made to his employees immediately on the carriers' ascertaining their authority to receive it.

Pleading.

A shipper cannot recover for damages to the shipment because of the carrier's failure to furnish a proper car, where that ground of negligence is not alleged in the declaration.

Harmless Error.

Where the court cannot see from the whole record that under proper instructions a different verdict could rightly have been found, or

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that appellant could have been prejudiced by the action of the court in giving and refusing instructions, it will not for errors therein reverse the judgment.

Appeal from Circuit Court, Augusta County.

Action by Samuel Moore against the Baltimore & Ohio Railroad Company. From the judgment rendered, plaintiff appeals. Affirmed.

Patrick & Gordon and Conrad & Conrad, for appellant.

J., J. L. & R. Bumgardner and Elder & Elder, for appellee.

BUCHANAN, J. Samuel Moore instituted his action against the Baltimore & Ohio Railroad Company to recover damages for losses resulting from the alleged negligence of the defendant company as a common carrier. The plaintiff was engaged in the business of shipping eggs and poultry in car load lots from Staunton and other points in the valley of Virginia to the city of Philadelphia, Pa. The claim set out in the first and second counts of the declaration was for the loss of eggs shipped October 20, 1899.

Upon the trial of the case the plaintiff recovered all the damages claimed in those counts, and there is no question made here as to the propriety of that recovery.

It is averred in the third count of the declaration that on the 3d of November, 1899, the plaintiff shipped a car load of live poultry over the defendant's road, which "was not safely delivered, but, on the contrary, by reason of unnecessary delay in his transportation for a period of 24 hours, the poultry was badly drifted and injured, and the plaintiff was prevented from delivering the same to the purchaser thereof on the Monday following the date of delivery for transportation, which was market day, and which poultry the defendant knew was shipped for sale on that day."

The fourth count is the same in substance as the third, except that, instead of the averment that the car was not safely delivered, it is averred that the defendant did not take due and proper care of the live poultry, but, on the contrary, it was so badly cared for that it was wholly lost.

The plaintiff's evidence shows that there was no delay in transporting the car from the point of shipment to its destination. It reached Philadelphia on time. The car was consigned to the plaintiff, and the defendant company declined to deliver it either to the plaintiff's employee who accompanied it, or to the party to whom the plaintiff had conditionally sold the poultry, or part of it, when demanded the next morning after its arrival, and did not deliver it until some time during that afternoon. There is a good deal of evidence as to the ground upon which the defendant company refused delivery, but upon the whole evidence it is clear, we think, that the reason why the car was not de-

livered earlier was because the defendant was not satisfied that it had the right to deliver it to the persons demanding it. The defendant telegraphed to its agent at the shipping point, and also to the plaintiff, to know if shipment was to be delivered to the plaintiff's employee, and, when informed that it was, the shipment was delivered.

Before delivering the car, the defendant had the right to be thoroughly satisfied that the persons asking for its delivery were authorized to receive it. "No circumstances of fraud, imposition, or mistake," says Hutchinson on Carriers, § 344, "will excuse the common carrier from responsibility for a delivery to the wrong person. The law exacts of him absolute certainty that the person to whom delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind; and no excuse has ever been allowed for a delivery to a person for whom the goods were not intended or consigned. If, therefore, the person who applies for the goods is not known to the carrier, and he has any doubt as to his being the consignee, he should require the most unquestionable proof of his identity; or if from any cause he should have reasonable doubt as to whether the person claiming the goods was entitled to them, he should refuse delivery to him until he establishes his right."

Conceding that the averments in the third and fourth counts of the declaration were sufficient to entitle the plaintiff to recover damages for a negligent failure to deliver the poultry after the car reached its destination, the evidence does not make out a case of such negligence. The car was consigned to the plaintiff. He was not in Philadelphia to receive it. The parties applying for delivery did not show any sufficient authority to justify a delivery to them. As soon as the defendant ascertained that the plaintiff's employee was entitled to receive the shipment, it was delivered to him.

The case made by the fifth count of the declaration is that the plaintiff delivered to the defendant, on the 15th of December, 1899, a car load of eggs and live poultry, at Staunton, Va., to be safely carried and delivered to the plaintiff in Philadelphia, Pa.; that the defendant did not safely deliver the same, but, on the contrary, by reason of unnecessary delay in the transportation of the eggs and poultry for a period of more than 24 hours, the plaintiff was prevented from selling the same on the Monday's market following their shipment; that the defendant knew the shipment was made for sale on that market day; and that by reason of the defendant's negligence and carelessness damages resulted to the plaintiff.

The sixth count in the declaration is substantially the same as the fifth, except that, instead of the averment that it did not safely deliver, it avers that the defendant did not take due and proper care of the articles shipped.

The evidence wholly fails to show any delay or want of care in transporting or delivering the car. It reached its destination on time, and was promptly delivered. When the car was unloaded, a number of the fowls were dead, and others injured by the heat, and had to be sold for less than the market price. The car in which the poultry was shipped was an ordinary box car, and the cause of the death of some of the fowls and of injury to others was no doubt due to the character of the car in which they were shipped. Some time prior to the shipment in question, the plaintiff had engaged a car from the Live Poultry Company for shipping his poultry, and made several shipments therein. This car was returned to Staunton a day or two before the shipment of December 15th was made, and for some reason, by mistake perhaps, was sent over to the yards of the Chesapeake & Ohio Railway Company. Shipments were usually made by plaintiff from Staunton on Fridays, gathering poultry along the line of the defendant's road, and leaving Strasburg on Saturdays for Philadelphia. But there was no arrangement with the defendant by which shipments were to be made regularly on Friday. On Thursday, the morning of the day before the shipment in question was made from Staunton, an agent or employee of the plaintiff inquired for the live poultry car. He was informed that it had been sent over to the Chesapeake & Ohio Railway Company's yards. After finding that the live poultry car had been sent away, the plaintiff's agent tried to have the car ordered back, but failed. He then notified his principal that he could not get the poultry car, and was instructed to get a stock car. He applied to the defendant's agent at Staunton for a stock car, and could not get it. Upon informing the plaintiff of his failure to get a stock car, he was directed to do the best he could, as the poultry was waiting along the line of road for shipment. He then applied to the defendant's agent for a car, and was informed that the best he could do would be to give him an ordinary box car. This the plaintiff's agent accepted, and made his shipment therein.

It is insisted in the petition for a writ of error, and in the plaintiff's brief, that it was the duty of the defendant company to furnish a suitable car in which to transport the poultry, and that for its failure to do so it was liable in damages for the injury which resulted therefrom. While it is the duty of a common carrier, engaged in the business of carrying live stock, to furnish suitable and safe cars and facilities therefor (*N. & W. Ry. Co. v. Harman*, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. Rep. 855; *C. & O. Ry. Co. v. Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A.

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449), it is entitled to a reasonable time within which to furnish such cars. Here not only was no opportunity given for the defendant to furnish a stock car, but no order or request beforehand was made that one should be furnished. But a conclusive answer to the plaintiff's claim for damages for the failure of the defendant to have the poultry car returned, or a stock car furnished, is that there is no such ground of negligence averred in the declaration. A party cannot charge one ground of negligence in his declaration and recover upon another. The object of the declaration is to set forth the facts which constitute the cause of action, so that they may be understood by the defendant, who is to answer them, by the jury, which is to ascertain whether or not they are true, and by the court, which is to give judgment. *Eckles' Adm'x v. N. & W. Ry. Co.*, 96 Va. 69, 25 S. E. 545, and authorities cited.

The negligence charged in the third, fourth, fifth, and sixth counts of the declaration not being proved, the jury could not have properly found in favor of the plaintiff on these counts. It is therefore unnecessary to consider the questions raised as to the correctness of the court's action in giving and refusing instructions, since it is the well-settled rule of this court, recognized and acted upon in numerous cases, that if the court can see from the whole record that under correct instructions a different verdict could not have been rightly found, or that the party complaining could not have been prejudiced by the action of the court in giving and refusing instructions, it will not for such errors reverse the judgment and set aside the verdict. *Leftwich v. Richmond*, 100 Va. 164, 40 S. E. 651; *Brock v. Bear*, 100 Va. 562, 42 S. E. 307.

We are of opinion that there is no error in the judgment complained of to the prejudice of the plaintiff, and it should be affirmed.

R. A. LEE & CO. v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of North Carolina, Nov. 22, 1904.)

[48 S. E. Rep. 809.]

Carriers—Bill of Lading—Construction.*

A railroad company issued to plaintiff a bill of lading for shipment of cotton to plaintiff at a certain point "shipside," and, in an action for delay, plaintiff sought to recover for "dead freight room" in a vessel on which plaintiff had contracted to ship the cotton, but which vessel had sailed before the arrival of the cotton: *held*, that the ordinary signification of the word "shipside" was a direction to deliver the cotton at some wharf accessible to the railroad's track, and there was nothing to indicate that plaintiff had contracted with any ship to carry the cotton, and hence such dam-

*See extensive note appended to *Outland v. Seaboard A. L. Ry. Co.* (N. Car.), 10 R. R. R. 476, 33 Am. & Eng. R. Cas., N. S., 476.

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ages could not be recovered, because not within the contemplation of the parties.

Same—Delay in Shipment—Damages—Contemplation of Parties.*

Where a carrier had no notice that a delay in the delivery of the goods shipped by plaintiff to his order would result in any unusual or special damage, the measure of damages for the delay was the difference between the market value when the goods should have been delivered and when they were delivered.

Same—Same—Same—Same—Interest.*

Where, in an action against a carrier for delay in the delivery of goods shipped by plaintiff to himself, there was no evidence that the carrier had notice of any special loss from delay, and there was no evidence as to the difference in the value of the goods at the time when they were delivered and when they should have been delivered, plaintiff was only entitled to recover interest on the amount he had invested in the goods during the time of the delay.

Appeal from Superior Court, Mecklenburg County; Justice, Judge.

Action by R. A. Lee & Co. against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for less than amount claimed, plaintiffs appeal. Affirmed.

This action was prosecuted by the plaintiffs for the recovery of damages incurred by the failure of the defendant to deliver a lot of cotton in a reasonable time. The defendant company issued to the plaintiffs its bill of lading at Little Rock, Ark., for 100 bales of cotton to be shipped to New Orleans, La., "shipside," consigned to the order of R. A. Lee & Co. The jury, under the instruction of the court, found that the defendant negligently failed to deliver the cotton at New Orleans within a reasonable time. On the question of damages the plaintiffs proposed to show that, by reason of the failure to deliver the cotton "shipside" at New Orleans within a reasonable time, they were unable to get the cotton loaded on a certain ship, and that the steamship company owning the ship required the plaintiffs to pay for dead freight room to the amount of \$83.30 between New Orleans and Genoa, Italy, to which place the plaintiffs intended to ship the cotton. The defendant objected, the testimony was excluded, and the plaintiffs excepted. The plaintiffs proposed to show that they were, by reason of the delay in shipping the cotton, compelled to pay to their customer, to whom they had sold the cotton for late shipment, \$86.23. This testimony was excluded upon defendant's objection, and plaintiffs excepted. It appeared that the plaintiffs had invested in the cotton \$4,387.88; that the delay in shipping, after allowing a reasonable time, from Little Rock to New Orleans, was 35 days. The court instructed the jury that the plaintiffs were entitled to recover interest on the amount invested for the time of the delay. From a judgment for this amount, the plaintiffs, having excepted, appealed.

See (*) on page 260.

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Thomas W. Alexander, for appellants.
Burwell & Cansler, for appellee.

CONNOR, J. (after stating the facts). There was no evidence tending to show that the term "shipside" had any special or peculiar meaning, when used in a bill of lading, other than that which was usually and generally given to it. It would seem, giving the word its ordinary signification, that it was a direction to the carrier to deliver the cotton at some wharf accessible to its track in New Orleans, to which a ship could come. In the absence of anything on the bill of lading to signify what ship was to receive the cotton, the consignee would have to notify the carrier. The cotton was shipped to the plaintiffs' order. We can see nothing in the bill of lading indicating to the defendant that the plaintiffs had contracted with any ship to carry the cotton, or had become liable for the freight room; and in the absence of such notice the carrier is not liable for such damages as accrued by reason of a special contract made by the plaintiffs with the shipowners, and they cannot be said to have been within the contemplation of the parties. It is immaterial whether we treat the cause of action as for a breach of contract, or for a negligent omission to perform a public duty arising out of a contract. The damages in either case are confined to such as were reasonably within the contemplation of the parties when the contract was made, by which the duty to the plaintiffs was assumed.

This court, in *Lindley v. Railroad*, 88 N. C. 547, held that for the failure to deliver freight, when the carrier is not informed of the special circumstances causing the loss of the plaintiff's contracts with other persons, the measure of damages is the difference between the market value of the article at the time it ought to have been delivered and the time it was in fact delivered. *Joyce on Damages*, § 1956, thus states the rule: "Where the delivery of freight is negligently delayed by a carrier, there may be, in an action for the breach of the contract, recovery of such damages as are the natural and proximate result of its act, and for such as reasonably might have been expected to be within the contemplation of the parties, at the time of entering into the contract, as the probable result of a breach. When the carrier has notice of the fact that a delay in the delivery of the goods will result in an unusual loss of some special damage to the shipper, there may be a recovery for the actual damages sustained, when the notice is of such a character that it will be presumed that the carrier contracted with reference thereto." *Swift River Co. v. Railroad*, 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288. The word "shipside," in the absence of any evidence giving it other than a general meaning, did not give to the defendant notice that the plaintiffs had made a special contract with a steamship company in regard to carrying the cotton to Genoa. There is

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not the slightest indication in the bill of lading as to what place or in what ship the cotton was to be carried. The exception cannot be sustained.

What we have said disposes of the second exception. In the absence of any notice to the carrier that the plaintiffs had made a special contract for the sale of the cotton, and would sustain a special loss for failure to deliver it within a reasonable time, the measure of damages is the difference in the value of the cotton at the time it should have been, and the time it was, delivered. There being no evidence of any such difference, the court below correctly instructed the jury to award the plaintiffs the interest on the amount invested during the time the cotton was negligently delayed. *Cotton Mills v. Railroad*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682. The principle is stated with great clearness in 5 Am. & Eng. Enc. 384, and sustained by a large array of cases cited from English and American courts. Negligence of Imposed Duties (Ray) 343.

The ruling of his honor was correct, and the judgment must be affirmed.

GEORGIA S. & F. RY. CO. v. MARCHMAN.

(Supreme Court of Georgia, Nov. 11, 1904.)

[48 S. E. Rep. 961.]

Sufficiency of Petition.

The petition set forth a cause of action, and was not subject to any of the objections set up in the demurrer.

Carriers—Failure to Deliver Cars—Authority of Agent.

An agent of a railway company, who has authority to make a contract to place cars along the line of railway at points other than stations for the purpose of receiving freight, has power to make an agreement in behalf of the company to receive such freight when deposited along the line of railway to await the arrival of the cars, notwithstanding he may not have authority to make a contract of affreightment.

Same—Duty to Receive Freight.

As a general rule, a railway company is not bound to receive freight except at stations, but it may, as a result of a custom, or as a consequence of an express contract, become obligated to receive freight at a point on its line of railway where there is no station, depot, platform, cars, or agent.

Right of Action—Duty to Receive Freight.

The contract having been made with the plaintiff in his own name, he was entitled to maintain an action in his own name for a breach of the contract, although he may have been the agent of the owner of the goods to be transported.

Sufficiency of Evidence.

The evidence authorized the verdict, and no reason has been shown for the reversal of the judgment.

(Syllabus by the Court.)

Error from Superior Court, Houston County; W. H. Felton, Jr., Judge.

Georgia S. & F. Ry. Co. v. Marchman

Action by R. L. Marchman against the Georgia Southern & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Marchman brought suit against the Georgia Southern & Florida Railway Company, alleging: On January 29, 1902, the railway company contracted with plaintiff to furnish him two cars the day following at the 31-mile post, a shipping point on the line of its railway, so that plaintiff could load on the cars and ship 82,600 pounds of cotton seed. Plaintiff commenced to transport the seed to the point agreed upon, and, finding that the cars were not there, notified the company that he had commenced to deliver the seed and that the cars were not there. Plaintiff was thereupon instructed by defendant to continue to deliver the seed, defendant again promising to furnish the cars. By reason of this contract and agreement plaintiff transported the seed to the shipping point in question, and placed them at the best and most convenient place, and after doing so notified defendant that the seed had been transported to that point, and that it was necessary that cars be furnished. At each time notice was given defendant promised to furnish the cars. Defendant failed to furnish the cars until February 4, 1902, at which time it furnished one car, and the other was not sent until February 13th. These cars were promptly loaded with the seed. By reason of the company's failure to furnish the cars promptly, as it had agreed to do, the seed were exposed to the elements and weather, and were injured and damaged in a given amount. Plaintiff loaded 44,600 pounds of the seed on one of the cars, and shipped them to a manufacturing company in Macon, and that company refused to receive them. Plaintiff was damaged by reason of the deterioration in value of these seed, resulting from the breach by defendant of its contract, in the sum of \$284.32. Similar allegations are made with reference to the remainder of the seed, and damage to these seed is placed at \$238.11. The entire damage is laid at \$522.43. The defendant filed a demurrer to the petition, setting up that the petition shows upon its face that the cotton seed were delivered at a point on line of defendant's road where there was no station, and were unloaded upon the ground, where they were exposed to the weather, plaintiff knowing at the time that there were no cars there in which to load the seed; and, if any loss or damage was sustained by plaintiff, it was the result of his own negligence. The demurrer was overruled, and the defendant filed exceptions pendente lite to this judgment. The defendant answered, denying all of the material allegations relating to the alleged cause of action. The trial resulted in a verdict in favor of the plaintiff, and the defendant complains because the court refused to grant a new trial.

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Hall & Wimberly, R. C. Jordan, and R. N. Holtzclaw, for plaintiff in error.

Duncan & Duncan and A. L. Miller, for defendant in error.

COBB, J. 1. There was no error in overruling the demurrer. The petition set forth a cause of action, and was not subject to any of the objections set up in the demurrer.

2, 3. Complaint is made that the court erred in not granting a nonsuit. The evidence authorized the jury to find that while, at the mile post referred to in the petition, there was no depot, station, platform, or agent, the company was accustomed to receive freight on a spur track at that point; that by an agreement made between the plaintiff and the master of trains of the defendant company cars were to be placed on the spur track at a given time for the purpose of receiving and transporting the seed; that at the time fixed plaintiff carried to the spur track a portion of the seed to be transported; that, finding no cars there, he notified the trainmaster that he had transported a portion of the seed, and was ready to carry the balance, and asked when the cars would be placed there; that he was informed that the cars would be placed there the next day, and instructed to continue to carry the seed to the place agreed upon; that in compliance with this direction the plaintiff continued to haul the seed to this place, and, no cars being there into which they could be loaded, the seed were placed upon the ground at the most convenient and suitable place that the locality afforded for the purpose for which they had been carried to that point; that there were no cars sent there for several days, and before any were sent and the seed loaded into them rain fell upon the seed and damaged them.

If the master of trains was authorized to make this contract in behalf of the company, a finding in favor of the plaintiff for whatever damage he sustained as a result of the rain upon the seed was authorized. The master of trains testified that he had no authority to make a contract of affreightment, but that he did have authority to make contracts for the placing of cars along the line for the reception of freight. He therefore had a right to make the contract which the plaintiff relies upon, and the question arises whether the damage resulting to the plaintiff from the seed becoming wet between the time the cars ought to have been placed at the point agreed on and the time they were actually placed there was the result of a breach of the contract made with the plaintiff. While the master of trains did not have authority to make a contract of affreightment, he did have authority to make an agreement to receive freight on board of cars at different points on the line of railroad preliminary to a contract of carriage being made by some other agent of the railroad company, and this conferred upon him authority to receive freight for the purpose of transportation, although he had no authority to make a contract of transportation itself. When he agreed with the

plaintiff to place cars upon the spur track at the mile post referred to, he agreed, in behalf of the company, to receive the freight at that point on board of cars. When the plaintiff came to this place with the cotton seed, and notified the master of trains that no cars were there, and was instructed by him to continue to haul the seed, this was, in effect, an agreement to receive the seed alongside the track to await cars that would be sent there to receive them. A railroad company is not generally bound to receive freight except at its stations, but it may, by custom, bind itself to receive it at other points; and certainly it may do this by express contract. See *Fleming v. Hammond*, 19 Ga. 145. Parties having freight to be transported by rail cannot make a good delivery to the railway company by simply depositing the goods along the line anywhere and everywhere. *Central R. Co. v. Hines*, 19 Ga. 209. But where by agreement freight is deposited at a given point on the line of railway for the purpose of immediate transportation, there seems to be no good reason why such deposit should not constitute delivery to the carrier, whose liability would commence from the time the goods were deposited at the place agreed on. See *Wilson v. Railway Co.*, 82 Ga. 388 et seq., 9 S. E. 1076; *Southern Express Company v. Newby*, 36 Ga. 635 (2) 91 Am. Dec. 783. There was no error in overruling the motion for a nonsuit.

4. It is contended, though, that even if the cause of action was made out by the evidence, the plaintiff was not entitled to recover, because he was not the owner of the seed, but a mere agent, purchasing seed for another, and that the title was in his principal. The railway company, through its authorized agent, dealt with the plaintiff as the owner. No other person was known in the transaction, and he is entitled to bring an action in his own name for a breach of the contract. The case of *Carter v. Southern Railway Company*, 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354, is controlling in principle. It is said, though, that in that case there was a contract of affreightment. This fact does not render the principle of that decision any the less applicable. The principle of the case is deeper than its mere surface facts. The case rules that a carrier cannot deny the title of one with whom it has made a contract of affreightment unless the title of the true owner is being asserted against it. The principle of the decision precludes the carrier from denying the title of a person with whom it has made a contract to receive freight in anticipation of a contract of affreightment to be subsequently entered into.

5. The evidence was conflicting on many material points. The jury having taken the version of the evidence which was favorable to the plaintiff's contention, and the law as applicable to the case when so taken being such as to authorize a recovery by the plaintiff, the discretion of the trial judge in refusing to grant a new trial will not be interfered with.

Judgment affirmed. All the Justices concurring.

MILLER v. WEST JERSEY & S. R. CO.

(Supreme Court of New Jersey, Nov. 7, 1904.)

[59 Atl. Rep. 13.]

Injury to Passenger at Station—Negligence of Stranger.*

A railroad company is not liable to one of its passengers for an injury received, while waiting for his train, by the carelessness of an employee of another company using the same station.

Action for personal injuries by Howard W. Miller against the West Jersey & Seashore Railroad Company. Verdict for plaintiff. Heard on rule to show cause. Rule made absolute.

Argued June term, 1903, before GUMMERE, C. J., and DIXON, HENDRICKSON, and PITNEY, JJ.

John W. Wescott, for plaintiff.

Joseph H. Gaskill, for defendant.

GUMMERE, C. J. The plaintiff was a passenger on the road of the defendant company, holding a ticket from Philadelphia to Paulsboro. His route was by ferry to Camden, and thence by rail to his destination. The terminal of the defendant company's railroad at Camden is in the station of the Amboy Division of the Pennsylvania Railroad Company at that place. While the plaintiff was standing on one of the platforms in the train shed of this station, waiting for his train, which had not come in, an employee of the Pennsylvania Railroad Company, who was hauling a truck load of baggage to one of that company's outgoing trains, carelessly ran the truck over the plaintiff's foot. To recover for the resulting injury, this suit was brought. At the trial the plaintiff had a verdict.

The main question presented by this rule is the liability of the defendant for the plaintiff's injury. It is clear that the doctrine of respondeat superior has no application in a case like that now under consideration. There was no such privity existing between the defendant and the employee of the Pennsylvania Railroad Company whose careless act produced the injury complained of as to render the defendant answerable for his acts. Its liability, if it existed at all, must have resulted from its failure to exercise that high degree of care for the safety of the plaintiff which its duty as a common carrier required. But while it is true that the duty of protection which a carrier owes to its passenger requires it to exercise very great care to safeguard the latter against injury

*As to the duty of protecting passengers against strangers, see foot-note appended to *Dufur v. Boston & M. R. Co.* (Vt.), 9 R. R. R. 711, 32 Am. & Eng. R. Cas., N. S., 711; *Tate v. Illinois Cent. R. Co.* (Ky.), 12 R. R. R. 482, 35 Am. & Eng. R. Cas., N. S., 482; *Penny v. Atlantic Coast Line R. Co.* (N. Car.), 10 R. R. R. 606, 33 Am. & Eng. R. Cas., N. S., 606.

not only from the acts of its own employees, but also from those of strangers, its responsibility in the one case is much broader than in the other. As to the acts of its servants, the rule that the master must respond applies; but, as to the acts of strangers, the carrier is responsible only for those which might have been reasonably anticipated, or, as some of the decided cases put it, naturally expected. *Pittsburgh, etc., Ry. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Flint v. Norwich, etc., Transp. Co.*, 34 Conn. 554, Fed. Cas. No. 4,873; *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190; *Exton v. Central R. Co.*, 62 N. J. Law, 10, 42 Atl. 486. In the *Hinds Case* a passenger was seriously injured by a crowd of drunken and riotous persons who came upon the train in defiance of the conductor in charge. The likelihood of danger to other passengers being apparent, the court held that the only question which the case presented was whether the conductor did all he could to quell the riot and eject the rioters, and that this question was for the jury. The *Flint Case* presented a similar situation. In the *Exton Case* the plaintiff was knocked down and injured while at the defendant's station, as a passenger, by some hackmen who were indulging in rough play around the station entrance. The liability of the company was held to exist by reason of the fact that the hackmen were accustomed to indulge in horse play around the station entrance, to the annoyance and danger of passengers, and that the company had taken no steps to put an end to such occurrences. In the *Putman Case* the plaintiff's intestate died from the effects of a murderous assault committed upon him by a fellow passenger upon one of the defendant company's cars. It was held that the defendant was not responsible, for the reason that there had been nothing in the conduct of the decedent's assailant prior to the commission of the assault to indicate to the conductor in charge of the car that there was danger or harm to any one from his presence on the car. These cases are illustrative of the principle that, although a carrier may naturally expect that sometimes during the course of its business passengers may be injured by the careless or wanton acts of fellow passengers or of strangers, it is not on this account chargeable with responsibility for any specific act so done, but that, to incur such responsibility, reasonable ground to anticipate the occurrence must have existed. While it may reasonably be anticipated that the employees engaged about a railroad station will sometimes be careless, third persons using the station cannot possibly foresee the doing of any specific careless act by one of such employees, unless such act is preceded by something which suggests the likelihood, or at least the possibility, of its taking place. In the present case there was nothing to suggest to the defendant company, any more than there was to the plaintiff, the possibility of danger to the latter, until the actual happening of the accident.

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Having no reason to except its occurrence, the company was under no obligation to take steps to protect the plaintiff against it.

The facts of this case as developed by the proofs presented a situation which called for the direction of a verdict in favor of the defendant. The rule to show cause should be made absolute.

PICKETT v. SOUTHERN RY. CO., CAROLINA DIVISION.

(Supreme Court of South Carolina, July 23, 1904.)

[48 S. E. Rep. 466.]

Railroads—Consolidation—Torts—Liability—Statute.

Under Act Feb. 19, 1902 (23 St. at Large, p. 1152), providing for the consolidation of certain railroads under the laws of the state, and that the consolidated company shall be subject to all the liabilities of the several constituent companies, the consolidated company is liable for a tort committed by a constituent company before the consolidation.

Instructions.

A statement in an instruction that "You have the testimony as to that," is not a charge on the facts.

Willfulness—Pleading.

An allegation in a complaint in an action against a railroad company characterizing the act by which plaintiff was injured as reckless, is equivalent to characterizing it as willful, so as to justify punitive damages.

Carriage of Passengers—Duty to Hold Trains for Belated Passengers.*

Where a carrier has stopped long enough to allow passengers at a regular station to get off or to get on, it owes no duty to hold its train for a belated passenger.

Same—Boarding Moving Train—Advice of Ticket Agent—Intentional Wrong—Punitive Damages.†

Where an intending passenger was late at the depot, and the ticket agent advised him, as the train began to move away, to board the same at once, and plaintiff climbed on the steps of the nearest car as the same was moving, and while on the steps was jerked off and injured, the statement of the ticket agent was not an intentional wrong, so as to support a verdict against the railroad company for punitive damages.

Appeal from Common Pleas Circuit Court of Orangeburg County; Jos. A. McCullough, Special Judge.

Action by John A. Pickett against Southern Railway Company, Carolina Division. From judgment for plaintiff, defendant appeals. Reversed.

W. C. Benet and E. M. Thomson, for appellant.

Nelson & Nelson and Melton & Belser, for respondent.

*As to the duties of a carrier relating to the reception of passengers, see generally, foot-note appended to *Sharp v. New Orleans City R. Co.* (La.), 11 R. R. R. 668, 34 Am. & Eng. R. Cas., N. S., 668.

†As to the right to recover punitive or exemplary damages for injuries to passengers, see foot-note appended to *McNamara v. St. Louis Transit Co.* (Mo.), 12 R. R. R. 832, 35 Am. & Eng. R. Cas., N. S., 832; foot-note appended to *Chiles v. Southern Ry.* (S. Car.), 12 R. R. R. 750, 35 Am. & Eng. R. Cas., N. S., 750.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff through the negligence and recklessness of the defendant. The allegations of the complaint material to the questions presented by the exceptions are as follows:

"(4) That on the 27th day of December, 1901, the plaintiff went to said depot at St. Matthews for the purpose of securing transportation therefrom over said line of railroad to the said city of Columbia upon the regular passenger train thereon, which, according to the schedule then of force, passed said depot at or about 34 minutes past 8 o'clock in the evening, that plaintiff reached said depot in ample time to permit him to purchase his ticket and board said train before it left said station; that, although it was then a very short time before said train was due, there was no agent at the ticket office at said station, and plaintiff was unable to get a ticket thereat; that plaintiff finally found said agent out at the train, after the same had arrived at said station, and applied to him to have said train wait until plaintiff could obtain a ticket and get on board the cars; that said train, having in the meantime begun to move away from said station, said agent told plaintiff to board the same at once, and thereupon plaintiff climbed upon the steps of the nearest car as the same was moving slowly past, and proceeded to go up into said car; that while plaintiff was still upon the steps of said car, and before he could pass therefrom onto the platform or into the interior thereof, the said train, by reason of the negligent, careless, and reckless management thereof on the part of the employees in charge of the same, was caused to give a sudden and violent jerk and lurch, hurling the plaintiff from the steps of said car to the ground and beneath the wheels of said car.

"(5) That the said injuries as aforesaid were caused to the plaintiff by the negligence, fault, carelessness, and recklessness of the said South Carolina & Georgia Railroad Company, its agents or lessees, in not having and keeping at said ticket office at said time an agent or other means for supplying plaintiff with the ticket required for transportation over said railroad; in failing to provide at said station a careful and competent agent for the transaction of its business; and in providing thereat an agent who was careless, incompetent, and inattentive to his duties; and in failing to have said train wait or stopped to permit plaintiff to board same; and in directing plaintiff to get aboard said train while it was moving off as aforesaid; and in causing said train to give a sudden and violent lurch and jerk in the manner it did while plaintiff was upon the steps of said car and in the act of boarding the same as aforesaid; by reason of all and each of which negligent, careless, and reckless acts the plaintiff was wounded and injured in the manner aforesaid."

The defendant denied the material allegations of the com-

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plaint, and set up as a defense that the plaintiff's injuries were caused by his own negligence. The defendant also alleged as a defense "that on the 27th day of December, 1901, when it is alleged that the plaintiff, John Alexander Pickett, was injured, the South Carolina & Georgia Railroad Company was a corporation duly organized and existing under and by virtue of the laws of the state of South Carolina, and owned the certain line of railroad (commonly known as the South Carolina & Georgia Railroad) extending from the city of Columbia to the city of Charleston, in said state; but it further alleges that at said time the said line of railroad was under lease to the Southern Railway Company, the said lease bearing date the 18th day of April, 1899, and being for a term of thirty years, and was at the said time operated by the said railway company under the terms of said lease. Defendant alleges that, if there was or is any right of action for such alleged injury to the said Pickett, an action for the same should be brought against the said lessor or its lessee, and not against this defendant, which is a corporation duly created and organized under the statutes of this state on the ——— day of June, 1902, subsequent to the time "the said John Alexander Pickett is alleged to have been injured."

The jury rendered a verdict against the defendant for \$8,000.

The first question that will be considered is whether his honor the presiding judge erred in refusing the defendant's motion to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action against it for the reason set forth in its defense. Section 2050 of the Code of Laws of 1902 makes lawful the consolidation of railroad companies, under the circumstances therein mentioned. Section 2051 provides the manner in which the consolidation is to be made. Sections 2052 and 2053 are as follows:

"Sec. 2052. Upon the making and perfecting the agreement and act of consolidation, as provided in the preceding section, and filing the same, or a copy, with the secretary of state, as aforesaid, the several corporations, parties thereto, shall be deemed and taken to be one corporation by the name provided in said agreement and act, possessing within this state all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of each of such corporations so consolidated.

"Sec. 2053. Upon the consummation of said act of consolidation, as aforesaid, all and singular the rights, privileges and franchises of each of said corporations, parties to the same, and all the property, real, personal and mixed, and all debts due on whatever account, as well as stocks, subscription and other things in action belonging to each of such corporations, shall be taken and deemed to be transferred to, and vested in, such new corporation, without further act or deed; and all property, all rights of way and all and every

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other interest, shall be as effectually the property of the new corporation as they were of the former corporation, parties by said agreement; and the title to real estate, either by deed or otherwise, under the laws of this state, vested in either of such corporations, shall not be deemed to revert, or be in any way impaired by reason of this chapter: provided, that all rights of creditors and all liens upon the property of said corporations shall be preserved unimpaired; and the respective corporations may be deemed to continue in existence to preserve the same; and all debts, liabilities and duties of either of said companies, shall thenceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."

The first section of an act approved 19th of February, 1902 (Acts of 1902, page 1152), provides: "That the Asheville and Spartanburg Railroad Company, the South Carolina and Georgia Railroad Company, the South Carolina and Georgia Railroad Extension Company, and the Carolina Midland Railway Company be, and hereby they are, authorized to consolidate their capital stocks, franchises and properties with each other *under the laws of this state*, upon the payment of the fees now required by law: provided, that from and after such consolidation or merger, the consolidated company shall possess and may exercise all the rights, privileges and franchises, *and shall be subject to all the liabilities of the said several constituent companies.*" (Italics ours.) In the agreement under which these corporations were consolidated is the provision that the name of the new corporation shall be "Southern Railway, Carolina Division." By reference to the act of 1902 it will be seen that the consolidation was to be made "under the laws of the state," and that the consolidated company "shall be subject to all the liabilities of the said several constituent companies." The language last mentioned evidently has reference to liabilities existing before the consolidation, for after that time the constituent corporations ceased to exist as such (except for the certain purposes mentioned in the statute), and could not any longer incur liabilities. Not only is the defendant made liable for debts existing against the constituent corporations at the time of consolidation by section 2053 of the Code of Laws, but likewise by the act of 1902.

The appellant relies upon the case of *Stewart v. Ry. Co.*, 64 S. C. 92, 41 S. E. 827. That case, however, simply decided that the constituent corporation remained liable for debts existing against it at the time of the consolidation, but the question whether the consolidated corporation was also liable was not involved in that appeal. Our construction of the general statute and the act of 1902 is that the consolidated corporation, as well as the constituent corporation, is liable for debts existing against the constituent corporation at the

time of consolidation. These views are in harmony with the case of *Jones v. Ry. Co.*, 67 S. C. 181, 45 S. E. 188. This disposes of the first, eleventh, and twelfth exceptions.

The second exception is as follows: "(2) Because his honor erred in charging the jury as follows: 'Negligence in directing the plaintiff to go aboard said train while it was moving off, in causing said train to give a sudden and violent lurch or jerk while plaintiff was on the steps—you have the testimony as to that.' It is respectfully submitted that when his honor said, 'You have the testimony as to that,' he was charging in respect to matters of fact, in violation of the constitutional inhibition in that regard." The record contains the following statement out of which this question arose: "Negligence 'in directing the plaintiff to get aboard said train while it was moving off, in causing said train to give a sudden and violent lurch or jerk' while plaintiff was on the steps—you have the testimony as to that, under the circumstances of the case. Do you believe that the railway did give a sudden and violent lurch—jerk—to the train, and was it such negligence, under the definition which I have described to you, and did it result in injury to the plaintiff as the proximate cause? If so, and plaintiff himself did not contribute to his injury—the proximate cause of his injury—then he would be entitled to a verdict." This was part of the charge in which the presiding judge stated the alleged acts of negligence, and then instructed the jury as to the law applicable to each. The plaintiff had introduced testimony for the purpose of showing negligence in the particular mentioned, and the remark of the presiding judge, "You have the testimony as to that," simply meant that they were to determine the facts from the testimony. This is shown by the language immediately following that remark. He did not undertake to give his opinion upon any fact that was in dispute. Furthermore, in *Turner v. Lyles*, 68 S. C. 392, 48 S. E. 392, the court says: "Since the Constitution of 1895, judges are not permitted to state the testimony to the jury, but it is not every statement of the testimony that will entitle the appellant to a new trial. The statement must be of testimony upon a fact in issue, and there must be reasonable grounds for supposing that the jury may have been influenced by such statement in a manner prejudicial to the rights of the appellant." This court is satisfied that the remark of his honor the presiding judge was not prejudicial to the rights of the appellant in this case.

The next question for consideration is whether his honor the circuit judge erred in ruling that the allegations of the complaint were sufficient to entitle the plaintiff to punitive damages. This depends upon the interpretation of the word "reckless." In Webster's International Dictionary the word "reckless" is defined as "rashly negligent; utterly careless or heedless." In *Proctor v. R. R.*, 61 S. C. 170, 39 S. E.

351, the court says: "It is quite true that negligence may be so gross as to amount to recklessness, but when it does it ceases to be mere negligence, and assumes very much the nature of willfulness; so much so that it has been more than once held in this state that a charge of reckless misconduct will justify the jury, if the same be proved, in awarding punitive, vindictive, or exemplary damages, while it never has been held, so far as we are informed, that the jury, under a charge of mere negligence, would be justified in awarding vindictive or exemplary damages. One in charge of so powerful and dangerous a piece of machinery as a locomotive is bound to use care in operating it, so as to avoid, as far as practicable, doing injuries to others; and if he uses such machinery recklessly, and without regard to the rights of others, his conduct may as well be characterized by the term 'willful' as by the term 'reckless,' for the difference in this regard between recklessness and willfulness is scarcely appreciable." This is conclusive of the question under consideration, and sustains the ruling of the circuit judge. This disposes of the third, fourth, fifth, sixth, seventh, and ninth exceptions.

The eight exception is as follows: "(8) Because his honor erred in refusing to charge the defendant's fifth request to charge, which was as follows: 'If the evidence shows that the train had started off and was in motion, then there was no obligation, statutory or otherwise, upon the defendant to cause the train to wait or to be stopped to permit the plaintiff to get on the train.'" Section 2134 of the Code of Laws is as follows: "Every railroad company in this state shall cause all its trains of cars for passengers to entirely stop upon each arrival at a station advertised by such company as a station for receiving passengers upon such trains for a time sufficient to receive and let off passengers." It will thus be seen that the statute has made provisions for persons desiring to board the train. The railroad company owes no duty to a belated passenger to stop its train in any other manner than that required by the statute. *Creech v. Ry.*, 66 S. C. 528, 45 S. E. 86. A contrary doctrine would tend to disarrange the schedules of the railroad company, and thus enhance the danger to the traveling public. It was, therefore, error to refuse the request.

The tenth exception is as follows: "(10) Because his honor erred in refusing to charge the defendant's seventh request, which was as follows: 'There being no testimony in this case which would warrant or support a verdict of exemplary or punitive damages, I charge you that you cannot award any such damages.'" The only testimony which we deem it necessary to discuss specifically in this connection is whether the testimony that the depot agent told the plaintiff to "go and get on the train" while it was in motion tended to show that the plaintiff was entitled to punitive damages on

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account of recklessness. It was only by construing the word "reckless" as the equivalent of the word "willful" that this court was able to say that the allegations of the complaint were sufficient to sustain a recovery for punitive damages. We shall accord to it that interpretation in determining the question presented by the exception. We are satisfied that the words used by the depot agent to the plaintiff were intended as a mere suggestion, and for the plaintiff's benefit; that there was no intentional wrong on the part of the agent, nor willful disregard of the plaintiff's right. It was error, therefore, not to charge as requested.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

SHAW v. MANCHESTER ST. RY.

(Supreme Court of New Hampshire, Hillsborough, Oct. 4, 1904.)

[58 Atl. Rep. 1073.]

Conductors—Assumption of Risk.*

A street car conductor, who continues in service knowing of the company's failure to provide a sufficient number of cars to accommodate the business, assumes the risks incident to the service.

Fellow Servants—Conductor and Car Starter.†

Where a street car was found defective and marked for repairs by the proper inspector, the company is not liable to a conductor for injuries resulting from the car starter ignoring the mark for repairs and sending the car out for service, such act being the negligence of a fellow servant.

Exceptions from Superior Court, Hillsborough County; Peaslee, Judge.

Action by Eugene H. Shaw against the Manchester Street Railway. Plaintiff had judgment, and defendant brings exceptions. Exceptions sustained.

The evidence tended to prove the following facts: On Sunday, October 10, 1897, the plaintiff was conductor upon the forward one of two cars passing in a northerly direction over the defendants' railway in Elm street, Manchester, between the transfer station and the foot of Manchester street. The car stopped to allow a passenger to alight, and was run into by the rear car—an open one—in consequence of the motorman's inability to seasonably stop because of a defect

*For the general principles involved in the doctrine of assumption of risks by employees, see foot-notes appended to Illinois Terminal R. Co. v. Thompson (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683, where all the preceding authorities in this series are collected or referred to.

†As to whether a yardmaster is the fellow servant of trainmen, see foot-note appended to Pennsylvania Co. v. Fishack (C. C. A.), 9 R. R. R. 85, 32 Am. & Eng. R. Cas., N. S., 85, where all the preceding authorities in this series are collected or referred to.

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in the brake staff at the forward end of the rear car. The plaintiff was injured by the collision. The defendants had a master mechanic, whose duties were "to see that repairs were properly done; cars safe to put on the street." If a car became disabled, it was reported to him or at the office by the conductor. A general inspection of cars was made at night by car inspectors acting under the master mechanic. If they discovered defects in a car which they were unable to repair themselves, they placed upon it a tag bearing the words, "To be left in," and left a report of the fact on the master mechanic's desk. The tag indicated that the car was to be left in for repairs. The defendants also had a car starter and street inspector, whose duty it was to select, put out, and start cars from the car barn on the different lines at the proper times, and to see that the cars were all running, or the men attending to their duties. He had no authority to start a car that was tagged for repairs. The defendants were short of open cars for use on Sundays and holidays, and the plaintiff well knew the fact. The defect in the brake staff of the rear car was discovered the night before the accident, and a tag, "To be left in," was placed upon it. The car starter saw the tag, but because there were no other cars to accommodate the Sunday travel, he started the defective one for a trip upon the "Lake circuit," intending that it should go from the car barn to Manchester street (a short distance) with the end having the defective staff forward. From the latter point the other end of the car would be forward throughout the entire route. It would be unnecessary to use the defective appliance, and consequently the car would be safe and suitable for the trip. If the car had proceeded directly from the car barn to Manchester street, there would have been no possibility of an accident of the kind which occurred, as there were no other cars upon that portion of the track at the time; but in consequence of a misunderstanding of orders by the men in charge of the car it was placed on a wrong track at first, and time consumed in correcting the mistake brought it in the rear of the plaintiff's car, which was upon its regular trip. The car starter, seeing that the car was upon the wrong track, directed that it should be transferred to the track intended, or assisted in making the transfer.

Burnham, Brown, Jones & Warren, for plaintiff.
Oliver E. Branch, for defendant.

CHASE, J. The defendants' failure to provide a sufficient number of open cars for the accommodation of their business would not entitle the plaintiff to a judgment in his favor, even if it were found that the deficiency was the proximate cause of his injury; for, well knowing of such failure, he voluntarily continued in the service, and thereby assumed the risk of injury from that cause. *Collins v. Car Co.*, 68 N.

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H. 196, 38 Atl. 1047; *Burnham v. Railroad*, 68 N. H. 567, 44 Atl. 750; *Young v. Railroad*, 69 N. H. 356, 41 Atl. 268; *Murphy v. Railway* (N. H.) 58 Atl. 835.

The only other negligence alleged is that of the car starter in sending the defective car over the road behind the car on which the plaintiff was employed. To render the defendants liable to the plaintiff for this negligence, it must appear that the car starter was acting in the performance of a nondelegable duty owed by the defendants to the plaintiff; or, in other words, that his act was essentially a master's act, as distinguished from a servant's act. One of the defendants' non-delegable duties was to exercise ordinary care in maintaining their cars in suitable repair for the uses to be made of them. They attempted to perform this duty through the agency of the master mechanic and employees acting under his direction. The car starter was not intrusted with the exercise of any portion of their discretion relating to the provision of cars, or the maintenance of them in suitable repair, or the determination of the question whether cars were suitable for use. He had nothing whatever to do with these matters. His duty was to superintend the use of cars that the defendants furnished for use. The performance if it began where the performance of the nondelegable duty of the defendants ended. There was no evidence tending to show the existence of a custom of sending cars over the road that were tagged for repairs. So far as appears, this was the only instance of the kind within the history of the defendants' business. There is, therefore, no ground for claiming that the car starter had authority for his act by implication. Furthermore, all the evidence tends to prove that there was no negligence on the part of the defendants in the performance of the duty under consideration. The defect in the brake staff was seasonably discovered by their agents or servants. The car was withdrawn from service for the time being for the purpose of making the needed repairs, and sufficient notice of the fact was given. The case in this respect differs so materially from *Rodney v. Railway*, 127 Mo. 676, 28 S. W. 887, 30 S. W. 150, cited by the plaintiff, that, if the law of Missouri relating to master and servant were like that of this state, the case would be an authority inferentially in favor of the defendants, rather than the plaintiff. It is not, and cannot with reason be, asserted that there was any want of ordinary care in these acts; nor can it be reasonably asserted that there was unreasonable delay in making the repairs. If the defect had not been discovered, or, being discovered, the car had not been withdrawn from service, the question would present a very different aspect.

But the plaintiff says these acts were not a full performance of the defendants' duty; that the duty included an obligation that they personally should see to it that the defective car did not go into the hands of their employees for use. This

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position is not tenable. As before suggested, the master's full duty consists in the exercise of care in providing suitable instrumentalities and maintaining them in a suitable state of repair. The servant's duty relates to the use of the instrumentalities furnished. "The line of demarcation here between the absolute duty of the master and the duty of the servants is the line that separates the work of construction, preparation, and preservation, from the work of operation." *St. Louis, etc., R. R. v. Needham*, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833. The car starter's act of sending a car out cannot reasonably be classed as work of construction, preparation, or repair. It requires no exercise of the master's discretion in respect to these matters. Where several cars are furnished for use, the designating of one for a particular trip—when, as in this case, the act does not include a determination respecting its suitability for use—is simply one step in the use of the car for that trip. It is in no sense a preparation of the car for use. The act does not differ in inherent character from the acts of the motorman in putting on and shutting off the power, or in setting and releasing brakes. It is a detail in the use of the instrumentality, not in the provision of instrumentalities, or in their maintenance in a suitable condition for use. *Labatt, M. & S.* §§ 603, 621. The fact that the act in this instance was unauthorized does not change its inherent character; rather it tends to disclose its character. Authority to put such a car to use would include authority to exercise the defendants' discretion in deciding upon its suitability for use under the circumstances. On the other hand, absence of authority to use shows want of authority to represent the master in the only particular which distinguishes the act as masterful. If the defect in the car had not been discovered, or if it had not been withdrawn from service, or the car starter had had authority to use it, the negligence of the act in sending the car out would be chargeable to the defendants, not merely because of the designation of the car for use, but because of the failure to use reasonable care in keeping the car in suitable repair. The car, at the time it was sent out, was not an instrumentality furnished by the defendants for use in their business, and for the time being they owed the plaintiff no duty with respect to its condition. The car starter's act was not that of a servant acting within the scope of his authority, but the act of a mere volunteer having no authority whatever. See *McGill v. Granite Co.*, 70 N. H. 125, 128, 46 Atl. 684, 85 Am. St. Rep. 618; *Turley v. Railroad*, 70 N. H. 348, 47 Atl. 261; *Andrews v. Green*, 62 N. H. 436; *Durgin v. Munson*, 9 Allen, 396, 85 Am. Dec. 770. It closely resembles the acts of servants who put tools furnished them by the master to uses for which they were not intended. *Young v. Railroad*, 69 N. H. 356, 41 Atl. 268; *Morrison v. Fibre Co.*, 70 N. H. 406, 47 Atl. 412, 85 Am. St.

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Rep. 634. The defendants are no more responsible for it than they would be for a like act by one of their conductors or motormen, or by a mere stranger.

The insufficiency in the supply of cars did not change the character of the car starter's act from that of a servant to that of a master. As before remarked, he had no authority to supply the deficiency. After the defendants withdrew the car from service, the extent of their business was limited by the facilities they had left for doing business. The situation was as if the defective car had no existence. They were under no obligation to the plaintiff or the public to continue the car in use. They were not bound to carry all passengers the instant they presented themselves. If they furnished reasonable facilities and received passengers without discrimination so long as they had room to accommodate passengers, they fulfilled their duty as common carriers. *Bennett v. Dutton*, 10 N. H. 481. The car starter certainly had no authority to enlarge their business. Any attempt of his in that direction would be his act, and not that of the defendants.

The plaintiff does not allege that his injury was due to a failure of the defendants to make and promulgate reasonable rules for the government of their employees in their business. He could not reasonably take this position, for, as before remarked, the evidence indubitably shows that the defect was seasonably discovered, and reasonable precautions were taken to prevent the employees from injury by it.

Nor did the the negligence alleged consist of a careless exercise of the defendants' discretion in fixing times for the movement of cars over the road. It was not the sending of a car over the road in the rear of the car on which the plaintiff was employed that caused his injury, but the use of a defective car. The recent case of *Wallace v. Railroad*, 72 N. H. 504, 57 Atl. 913, furnishes no support for a judgment in the plaintiff's favor.

The facts reported do not tend to prove want of care on the part of the defendants in the performance of any non-delegable duty which they owed to the plaintiff, but only want of care on the part of a fellow servant. The plaintiff assumes the risk of injury from such negligence when he entered the defendants' employ, and he has no ground of action against them therefor.

Exception sustained; verdict set aside; judgment for the defendants. All concurred.

SHADOAN'S ADM'R *v.* CINCINNATI, N. O. & T. P. R. CO.

(Court of Appeals of Kentucky, Oct. 27, 1904.)

[82 S. W. Rep. 567.]

Master and Servant—Duties Owing Master—Injury While Not Discharging Duty—Liability.*

Where a brakeman on a freight train went into the cab of the locomotive of another train to secure a drink of water, and while there for that purpose the two trains collided, and he was killed, there could be no recovery, though the collision was due to the negligence of the railroad's servants, deceased not being in the discharge of any duty to the master.

Appeal from Circuit Court, Pulaski County.
 "Not to be officially reported."

Action by J. L. Shadoan's administrator against the Cincinnati, New Orleans & Texas Pacific Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. A. Morrow and J. W. Colyar, for appellant.
 O. H. Waddle and John Galvin, for appellee.

BARKER, J. J. L. Shadoan was a brakeman in the employ of the Cincinnati, New Orleans & Texas Pacific Railroad Company, a corporation operating a railroad through the state of Kentucky. At the time of the injury complained of in this action he was first brakeman on No. 38, which was a freight train running north. At Whitley, Ky., it met No. 35, a freight train running south. These two trains stopped under orders at the point of meeting, so as to allow No. 31 to pass them. No. 35 was on the siding and No. 38 on the main track, the switch of the siding being open, and the two trains stood facing each other at from 30 to 50 yards apart. The road at this point was down grade looking north, No. 38 being on the higher elevation. The day being warm, the entire crew from each train alighted for the purpose of rest and recreation while waiting for No. 31. Appellant's decedent had gone forward and thrown open the switch of the siding, and then he seems to have climbed into the cab of No. 35, in order (it is said) to obtain a drink of ice water, there being none on his train. At this time, whether from a defect in the throttle of the engine of No. 38, or because the air had so leaked from the air brake as to release them from the wheels, train no 38 suddenly started and rolled down against No. 35 with such force as to crush the decedent between one of the cars and the tender of the engine of the latter train, inflicting such injuries as caused his death within an hour or two thereafter. To recover damages for this injury this

*See foot-note appended to *Louisville & N. R. Co. v. Hocker* (Ky.), 23 Am. & Eng. R. Cas., N. S., 522; *Benson v. Chicago, etc., Ry. Co.* (Minn.), 16 Am. & Eng. R. Cas., N. S., 546.

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action was instituted, it being alleged in the petition that it was caused by the gross negligence of appellee's agents and servants. On the trial of the case, at the close of appellant's (plaintiff's) evidence, the court sustained the motion of appellee for a peremptory instruction in its favor.

Assuming that the collision of the trains was the result of the negligence of appellee's servants, we think the trial court ruled correctly in granting the peremptory instruction complained of. Appellant's decedent was on train No. 35 for his own convenience, and not in the discharge of any duty to appellee. In the case of *L. & N. R. Co. v. Hocker*, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119, one of the employees of the railroad company, for his own convenience, had gone between cars in its yard, where he was injured (it is alleged) by the gross negligence of its employees in backing a train against the cars between which he was standing. In the opinion it is said: "It seems to us from the undisputed facts of this case that, as appellee was not in his place of business, or in the discharge of any duty imposed upon him by his employment, the appellant company owed him no duty except to avoid injuring him after it had discovered his perilous position." This principal is conclusive of the case at bar, and the judgment is affirmed.

CHATTANOOGA ELECTRIC RY. CO. v. MOORE.

(Supreme Court of Tennessee, Oct. 8, 1904.)

[82 S. W. Rep. 478.]

Master and Servant—Personal Injuries—Negligence—Telephone Poles Dangerously near Railroad Track.*

A street railroad company is not chargeable with negligence in permitting telephone poles to be erected on land not owned or controlled by it so near the track as to be dangerous to employees operating cars.

Appeal from Circuit Court, Hamilton County; M. M. Allison, Judge.

Action by J. N. Moore against the Chattanooga Electric Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. T. Matthews and Jno. H. Earley, for appellant.
Brown & Spurlock, for appellee.

WILKES, J. This was an action for damages against the Chattanooga Electric Railway Company and the East Tennessee Telephone Company. There was a trial before a jury in the court below, and a verdict and judgment for \$200 against the electric railway company. The suit as to the

*See section XI of note, 8 R. R. R. 548, 31 Am. & Eng. R. Cas., N. S., 548.

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telephone company was dismissed before trial. The electric company has appealed, and assigned errors.

The plaintiff was a conductor on the electric company's cars, and was at the time of the injury leaning out of the rear of his car on one side, to see whether his trolley wheel was properly adjusted upon the speed wire, his car at the time being in motion, when his head came in contact with a telephone pole placed about 34 inches from the rail of the car line and 14 inches beyond the side of the coach as it passed along the track. The theory upon which the recovery was had was that the electric company was negligent in allowing the poles of the telephone company to be placed so near its rails as to be dangerous to its employees in operating its cars. The conductor knew of the presence and proximity of these poles, and had seen them often, but evidently did not have them in mind when he was struck. The proof tends to show that he might have adjusted his trolley wheel from the rear center of the car platform, and without leaning out beyond its side, and would have been perfectly safe in so doing. His back was towards the pole when struck.

It is assigned as error that the court, in substance, charged that, if the electric company permitted the telephone company to erect its poles so near to the track as to be dangerous to employees in operating the cars, or permitted them to so remain, and this was the proximate cause of the injury, the electric company would be liable.

The exact charge complained of is as follows:

"If this pole was erected by the telephone company, which is not a defendant in this suit, and if it was placed at a dangerous proximity to the railroad, and if the defendant company negligently permitted this telephone company, without objection on its part, to erect this pole so dangerously close to its track that it was dangerous to employees operating cars in that situation, and if the defendant railway company negligently permitted this post to remain in this dangerous condition, if you should find that it was in a dangerous condition (that is, dangerously close to the track; so close to the track that it was dangerous to employees on the cars in the discharge of their duties; that there was danger from this post to the employees), and if the plaintiff's injury was a direct and proximate result of the negligence of the defendant in permitting this pole, without objection, to be placed dangerously near the track, and it remained there for some two years or more, then this defendant company would be liable."

We think this charge would be substantially correct if the telephone poles had been placed upon the premises or right of way of the electric company, but not if they were situated upon the highway, or on other premises of which the electric company had no control. It does not appear that the electric company had any right of way at the place of injury except

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that covered by its cars and tracks. It simply had a franchise to construct and operate its line along the street or highway.

These poles being on land not belonging to the electric company, but on the public highway or street, over which the electric company had no authority, there was no obligation on the part of the electric company to abate them as a nuisance; nor did it have any power over them, or anything to do with them, more than any other citizen. The case of *Lucas v. St. Louis R. R. Co.* (Mo.) 73 S. W. 589, 61 L. R. A. 452, is directly in point, and laid down the correct rule as follows:

Plaintiff sued the railroad company for its negligence in maintaining a stump on the sidewalk so close to its track that when she stumbled over the same and fell one of its cars came in contact with her, and inflicted upon her serious injuries. The lower court, in its charge, authorized the jury to find judgment against the defendant, but on appeal to the Supreme Court the cause was reversed upon the ground that the evidence showed that the stump was the remnant of a pole which had been planted in the street by the electric light company, and was not on the property of the defendant street railway company. Among other things, the court said:

"If any owner raises up, or permits any one else to do so, or keeps up or fails to remove, a nuisance on his own premises, by which any one suffers injury, he is liable, because he violates his duty as a citizen. If any one creates a nuisance upon a public highway, he is primarily liable to any one who is injured thereby, because he has violated his duty as a member of society, and has been guilty of a wrongful act for which he is primarily liable. But no citizen is under any personal legal obligation to remove a nuisance from a public highway, notwithstanding he may know it is calculated to do injury to a traveler on the highway if it is allowed to remain there. To make any man liable for a tort, he must have done or omitted to do a duty imposed upon him by law. In the absence of such a duty, there is no liability. The law imposes no duty upon the defendant to remove a nuisance in a public highway which it did not put there, and has nothing more to do with than any other citizen."

The question of contributory negligence on the part of the conductor is not raised by the assignment of errors, and we express no opinion on that feature of the case.

We are of opinion, however, that it was reversible error to charge, in substance, that the electric railroad company would be liable for the erection and maintenance of these poles in the highway or street contiguous to the line of the road unless it appeared they were on premises which the electric company owned or controlled, and for this error the judgment of the court below is reversed, and the cause is remanded for a new trial, and appellee will pay costs of appeal.

McHUGH v. MANHATTAN RY. CO.

(Court of Appeals of New York, Nov. 15, 1904.)

[72 N. E. Rep. 312.]

Killing of Car Coupler—Time and Cause of Accident—Question for Jury.

Where there is evidence that plaintiff's decedent, when last seen, was about to make a coupling between a car and an engine; that no one saw him come out; that the coupling was made; and that his body was found at about the place where it was made—the time when and the manner in which the accident happened to him through alleged negligence of defendant railroad company in starting its train is a question for the jury.

Same—Substitute Train Dispatcher as Vice Principal in Starting Train.*

Where one, in the absence of the regular train dispatcher, had been accustomed for three years to perform his duties, his act in starting a train while plaintiff's decedent was coupling or attempting to withdraw to a place of safety was not a mere detail of work, under the employers' liability act (Laws 1902, p. 1748, c. 600, § 1), but that of a superintendent, for whose negligence the railway would be liable.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Kate McHugh, administratrix of Frank McHugh, against the Manhattan Railway Company. From a judgment of the Appellate Division (85 N. Y. Supp. 184) affirming a judgment for defendant, plaintiff appeals. Reversed.

Herbert C. Smyth and Millard F. Tompkins, for appellant.
Joseph H. Adams and Charles A. Gardner, for respondent.

CULLEN, C. J. This action is brought under the employers' liability act (chapter 600, p. 1748, Laws 1902), the plaintiff having given the notice to the defendant required by that statute. The plaintiff's intestate was a coupler in the employ of the defendant in its yard at Rector street, in the city of New York. At this point the elevated trains coming from the North were switched over to the north-bound track. An engine stood on that track, ready to be attached to what had been the rear of the incoming train. When the train was brought to a stop, the engine was backed down to the train and coupled with it, while the engine at the other end of the train was detached. The deceased's business was to couple the waiting engine to the train. In the performance of this duty, it was necessary for him to go between the engine and the car platform, couple the drawbar on the engine to that on the car by a link and pin, connect the two pieces of vacuum hose by which the brakes are operated, and fasten

*As to whether train dispatchers and telegraph operators are fellow servants of other railroad employees, see foot-note appended to *Phinney v. Illinois Cent. R. Co.* (Iowa), 12 R. R. R. 14, 35 Am. & Eng. R. Cas., N. S., 14, where the preceding authorities in this series are referred to.

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two safety chains from the engine to the car; one being on each side of the car. At this yard one Coleman was the train dispatcher. By the rules of the company, he had "charge of the yard and the sidings at stations where trains are made up, the movement of trains therein and of the yard force employed at those points." Rule 183. The engine-men were directed to obey the orders of the "train dispatcher in regard to shifting, making up trains and starting from terminals while engines are in train service." Rule 123. It was the duty of the train dispatcher to stand on the platform, where he could observe the coupling of the fresh engine to the train. When that was done, and the time for departure had arrived, by pressing a button he sounded an electric gong which notified the conductor and guards on the train that the train was ready to start. The signal to start was thereupon transmitted by the guards and conductor to the engineer, who would then start the train. In the ordinary operation of the road, about two minutes elapsed from the time the train entered the station from the north till it started on its return trip. Coleman discharged other duties, which at times required him to turn over the management and dispatch of the trains to his telegraph operator or train clerk, one Flanagan, who acted for Coleman on this occasion. Such was the ordinary course of business as it had continued for three years. On the occasion of the accident which is the subject of this suit, the plaintiff's intestate was last seen between the car and the engine, apparently about to make the coupling. Shortly after Flanagan sounded the gong for the train to move, and after the signal had been transmitted by the guards and conductor to the engineer, the train started. In a very short period a cry was heard from underneath the car, the train stopped, and deceased was found crushed at the rear truck of the forward car. The engineer testified that about eight seconds elapsed from the time the dispatcher sounded the gong till the train started and he heard the cry of the deceased. A witness not connected with the road says that about a second of time elapsed between the two occurrences. The engineer states that his engine moved some 10 or 11 feet before he stopped it. On going to the rear of his engine he found that the coupling had been completely effected. Flanagan was not put on the stand by either side. At the close of the evidence the court dismissed the complaint, and this ruling has been affirmed by the Appellate Division by a divided court.

It is quite evident that there are three questions involved in this case: (1) The sufficiency of the evidence to show how the accident happened. (2) If it happened while the deceased was coupling the train, or before he had withdrawn from between the car and engine to a place of safety, was Flanagan negligent in giving the signal for the train to start? (3) Was the defendant, under the statute, liable for Flanagan's

negligence in this respect? As to the second question, the learned Appellate Division was of opinion that, if Flanagan started the train before the deceased had withdrawn from between the car and engine, he was guilty of negligence, or at least the jury might so find. We think the proposition too clear to require any discussion. The third question—as to the liability of the defendant for the negligence of Flanagan—the learned court did not determine, but placed its decision affirming the nonsuit below on the ground that the plaintiff had not shown where the deceased was at the time Flanagan had sounded the gong, or that he was then actually engaged in his work. It was said by the learned court: “It is as reasonable to suppose that he [deceased] had stepped back from the car, having completed his work of coupling the train with the engine, and that in some way his clothing was caught by the train, or as the train started he slipped and fell, or that he attempted to cross between the engine and the car to the platform, as it is to suppose that the starter started the train when the deceased was between the engine and the car.” To this view we cannot assent. It was a question of fact for the jury to determine how the accident occurred. We concede that there must be some evidence upon which the jury can base its determination, and that determination must not be mere conjecture. But the only person, with the possible exception of Flanagan, who knew the exact position of the deceased when the train started, was the deceased himself. “If he had survived the accident, it would have been necessary for him, in order to meet the burden of proof, to state what he did and what he tried to do, fully and explicitly; but, as he is dead, less evidence is required of his personal representatives.” *Schafer v. Mayor, etc., of N. Y.*, 154 N. Y. 466, 48 N. E. 749. The last position in which the deceased was seen before the accident was standing at the platform of the car, ready to make the coupling. That he went between the cars and made the coupling is certain, not only from the testimony of the engineer of the train, but from the fact that the train moved; and there is no evidence to show that from that position he ever came out. If the engineer’s estimate of the distance his engine moved—10 or 11 feet—is correct, the place where the deceased was found under the cars would seem to indicate that he had been struck down at the very place where he made the coupling. In addition to this, when there is considered the very brief period of time during which the deceased was compelled to do the several parts of his work—putting the link through the drawheads, connecting the vacuum hose, and fastening the safety chains—we think the jury might well have found that the train was started before the deceased, after the completion of his work, had been able to get out from between the cars.

It may be conceded that, apart from the provisions of the

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employers' liability act, the defendant would not have been liable to its employees for the negligence of either Coleman or Flanagan. *Loughlin v. State of N. Y.*, 105 N. Y. 159, 11 N. E. 371. By that statute, however, a new liability was imposed on the master. Section 1 gives an employee or his personal representative, in case the injury results in death, the right to compensation where he has been injured by reason "of the negligence of any person in the service of the employer intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer." The learned counsel for the respondent concedes that Coleman was a superintendent, within the terms of the statute. Coleman's own evidence was sufficient to justify a finding that the defendant consented to Flanagan's acting as his substitute in starting the trains from the yard. But the learned counsel for the respondent contends that the particular duty of seeing that the coupling was made and the coupler safely withdrawn, and thereupon giving the signal to start the train, whether performed by Coleman or Flanagan, was not in the nature of superintendent, but merely a detail of the work, for negligence in the discharge of which duty by either employee the defendant was not liable under the statute. This is the most serious question presented by the case. Doubtless, had the train been started by the engineer without a signal, or had the conductor or one of the guards improperly given a signal for the train to move, it would have been the act of a fellow servant, and the defendant would not have been liable therefor. But it does not follow that the act of a train dispatcher in sending out the train is to be regarded in the same light, or as of the same character. There are many acts, the nature of which is such as to clearly establish their character, whether of ordinary labor or of superintendence, and this regardless of whether the act may be done on a particular occasion by a superintendent or by an ordinary workman. On the other hand, there are many acts which are indeterminated in their character, and whether they are to be deemed acts of superintendence or not may depend on the manner in which the business is conducted, and the rank and position of the employee to whom the performance of those acts is intrusted. Thus we said in *Eaton v. N. Y. C. & H. R. R. Co.*, 163 N. Y. 391, 57 N. E. 609, 79 Am. St. Rep. 600: "The question whether a faulty act or omission complained of is negligence in the discharge of the duty of the master, as such, or is a detail of the work, may depend on the manner in which the work is carried on." In the present case, under the defendant's rules already quoted, and the ordinary conduct of its business, the making up of the trains and the dispatch from the yard were functions imposed on the superintendent or train dispatcher as a part of

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his duty as such. Both were duties or functions of superintendence. The failure of Flanagan, if there were such, was in his failure to properly supervise the preparation of the train, and in failing to ascertain that the engine had been connected with the cars, and that the employee engaged in that labor had withdrawn to a place of safety. If he had done this work properly, and the accident had been caused by mistake of some other employee in transmitting Flanagan's directions, the question would be entirely different. *Hankins v. N. Y., L. E. & W. R. Co.*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, 40 Am. St. Rep. 616. The case at bar is quite similar to one decided by the Supreme Court of Massachusetts under a statute substantially the same as our own. In *Davis v. N. Y. & N. H. R. Co.*, 159 Mass. 532, 34 N. E. 1070, the plaintiff was one of a gang of workmen employed in repairing tracks. It was the duty of the foreman of the gang to warn the workmen of the approach of trains. By failure to give such warning, the plaintiff was run down. A recovery by the plaintiff was upheld. There may not be entire harmony between the various Massachusetts decisions that have arisen under this legislation. Possibly they give more weight to the consideration of the general character of the foremen's or superintendents' duties, and less to the character of the particular act in which the misconduct occurs, than we would be disposed to accord to those factors. Nevertheless the case cited seems well justified on principle, and its authority has not been impaired by any subsequent decisions of the Massachusetts courts.

The judgment should be reversed and a new trial granted; costs to abide the event.

HOOE v. BOSTON & N. ST. RY. CO. et al. WELCH v. SAME.
LANE v. SAME. DONAHUE v. SAME.

(Supreme Judicial Court of Massachusetts, Essex, Nov. 22, 1904.)

[72 N. E. Rep. 341.]

Fellow Servants—Contractor and Hands.

One who, under a contract, provides all labor and materials to complete the gradings and ballasting of a railroad bed and has the management and control of the men employed in the work "subject to the direction and acceptance of the engineer," is not a fellow servant of the men employed under him.

Same.

An employee engaged in charging holes in rock with dynamite and exploding the same is a fellow servant of the employees engaged in drilling the holes for the charges.

Same—Foreman's Assistant and Hands.*

An employee, while engaged in assisting the foreman or superin-

*As to whether a foreman is a fellow servant of a hand working under him, see foot-note appended to *Fogarty v. St. Louis Transfer Co. (Mo.)*, 11 R. R. R. 578, 34 Am. & Eng. R. Cas., N. S., 578, where all the preceding authorities in this series are referred to.

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tendent in making an inspection after a blast of dynamite for the purpose of ascertaining whether any part of the charge had failed to explode, is performing a part of the master's duty, and is not a fellow servant of those engaged in drilling holes for the charge and removing the rock after the blast.

Exceptions from Superior Court, Essex County; Frederick Lawton, judge.

Separate actions by William D. Hooe, Garrett E. Welch, Ernest Lane, and John D. Donahue against the Boston & Northern Street Railway Company and others. To the judgments rendered defendants bring exceptions. Exceptions in the first three cases sustained. Exceptions in the fourth case overruled.

R. H. Sherman and W. C. Ford, for plaintiffs Garrett E. Welch and Wm. D. Hooe, W. J. Bradley and C. H. Rogers, for plaintiff Ernest Lane.

Knox & Coulson, for defendant Farnum.

J. P. Sweeney, H. R. Dow, and L. S. Cox, for defendant Middleton & Danvers St. Ry.

KNOWLTON, C. J. The first three cases were brought to recover damages caused by an explosion of dynamite on February 14, 1902, and the fourth was brought against the same defendants to recover for a similar explosion which occurred on February 15, 1902. The first three cases were tried together in the superior court, and the four were argued together in this court. We will consider first the exceptions of the defendant Farnum in the first three cases. The plaintiffs were admitted to have been in the exercise of due care. The explosion occurred in the morning, while the men were at work with pick and shovel, under the direction of the superintendent of the defendant Farnum, on the mass of earth and rocks where a blast had been exploded about half past 3 o'clock in the afternoon of the day before. There was evidence which well warranted the jury in finding that the accident was caused by an unexploded piece of dynamite which was left in one of the holes after the blast of the day before, and that no such inspection was made by the defendant or his superintendent as should have been made to guard against such an accident. See *Hopkins v. O'Leary*, 176 Mass. 258, 57 N. E. 342.

The judge rightly declined to instruct the jury that the superintendent and workmen engaged in the work were servants of the Middleton & Danvers Street Railway Company, and not of the defendant Farnum. Upon the undisputed facts, under the agreement in writing between Farnum and the railway company, the management, control, and direction of the men employed upon the work were in the defendant Farnum, and not in the railway company. It was a contract which gave Farnum the legal right to provide all the necessary labor and

materials to complete the subgrading and ballasting of the proposed line of railroad. By the terms of the writing he was to have "the general direction of the work," and he could be displaced only in case the progress made on the work was "not satisfactory to the railroad company" in reference to the time when he agreed to have it completed. The expression, "subject to the direction and acceptance of the engineer," is similar to the common provision in building contracts which gives the architect a right to represent the owner in determining whether the work is in accordance with the requirements of the contract. In this case the work to be done is described in the agreement very generally. Probably something as to the details of construction was understood to be left to the determination of the engineer or agent. But this did not give to the engineer any right of control or direction as to the execution of the work after he had indicated to the contractor what was to be done and what materials were to be furnished. His further right was to determine whether the work done by the contractor was acceptable. The employees, being subject to the defendant's direction and control while engaged in working, were his servants, in reference to the rule which makes a master liable to third persons for the negligence of his servants. *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, and cases cited.

The third and fourth instructions requested were rightly refused. There might be a liability on the part of the defendant, even though neither he nor his superintendent knew or had reason to believe that there was an unexploded charge of dynamite there. It was enough to create a liability if they knew, or ought to have known, of such a possibility or probability that some of the dynamite remained unexploded as to make an inspection necessary for the safety of the workmen.

In one particular there was error in the instructions. Sheridan, who was called the "powderman," was not a superintendent. He was a workman who charged the holes with dynamite and exploded the charges. He also sometimes assisted the foreman or superintendent, Duggan, in making an inspection after a blast, for the purpose of ascertaining whether any part of the dynamite had failed to explode. In this work of inspection for the purpose of securing to workmen a safe place in which to work he represented the defendant, for he was performing a part of the master's duty, for the proper performance of which the master was responsible to his servants, whether he performed it in person or delegated it to a servant. *Moynihan v. Hills Company*, 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348. But in charging the holes and exploding the blasts he was doing the ordinary work of a servant, like the other workmen who drilled the holes. While it was a more important

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part of the work than drilling, it was work which would ordinarily be done by a servant, and not by the master. Negligence in doing it would not subject the master to liability to a fellow servant injured by the neglect. The defendant requested the judge to instruct the jury that, if the "accident was caused by the negligence of Sheridan, who had charge of the firing of the blasts of dynamite, the plaintiffs cannot recover, because said Sheridan was a fellow servant of the plaintiffs." The judge declined to give the instruction, but told the jury that, "if there was any negligence in setting off the blast of dynamite on the day preceding the accident, either on the part of the foreman, Duggan, or the powderman, Sheridan," they might find for the plaintiffs. If there was negligence on the part of the superintendent in failing properly to supervise this part of the work, if supervision by the master or his superintendent was necessary, the defendant would be liable; but for the negligence of the workman himself he would not be liable to other servants. While this request went too far, inasmuch as there might have been negligence of Sheridan in inspection, in which he undertook to perform the master's duty, and for which the master would therefore be liable, the request directed attention to his firing the blasts, and the instruction was given in reference to that. Another part of the instructions was given in reference to his possible negligence in inspection. We are of opinion that by the exception to the refusal to give the instruction requested and to the instructions given the defendant saved his rights in this particular, and that a new trial should be granted.

In the trial of the fourth case, brought by Donahue, it appeared that the superintendent, Collins, fired the blasts, and no such request for instructions was made, and no such exception was taken. For the reasons given in the other cases, the exceptions of the defendant in this case should be overruled.

In each of the first three cases the entry will be: Defendant's exceptions sustained; and in the last case: Defendant's exceptions overruled.

So ordered.

LAPORTE *v.* PITTSBURG & L. E. R. CO.

(Supreme Court of Pennsylvania, June 15, 1904.)

[58 Atl. Rep. 860.]

Injury to Employee—Fellow Servants.

Plaintiff was employed by a coke company to shift cars on the side tracks of the company, such cars being placed thereon by defendant railroad company, which every morning placed empty cars on the tracks. Plaintiff's duty was to shift the cars on the side tracks in front of the ovens of the coke company. On the morning of the accident the cars were delivered on one of the side tracks, and plain-

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tiff was advised by the freight conductor that no more cars were coming on such track. The switch had been negligently left open on the track on which plaintiff was working, and cars intended for another side track ran through the switch, and injured plaintiff: *held*, that under Act April 4, 1868 (P. L. 58), the railroad crew and card shifters were co-employees while working in the yard together, and plaintiff could not recover.

Appeal from Court of Common Pleas, Fayette County.

Action by Mike Laporte against the Pittsburg & Lake Erie Railroad Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

The court below filed the following opinion on motion to take off nonsuit:

"The plaintiff lived at Adelaide, a small coke town in Dunbar township, at the time of the accident which occasioned the injuries complained of in this case. He was employed by the H. C. Frick Coke Company in the capacity of car shifter in connection with the operation of their coke works at that place. This plant includes five double blocks of ovens, and the product thereof, which is considerable, is shipped out over the Pittsburg, McKeesport & Youngbiogheny Railroad, which is operated by the defendant. The main line of the railroad is some distance from the ovens, and the empty cars are supplied and the loaded ones removed by a branch, which for some distance from the main line consists of but a single track; but to serve all the five double blocks of ovens, some of which appear to be located parallel to each other, it is necessary that they have other lines off the main branch, and, as a consequence, the coke company maintains three tracks in connection therewith, known as 'front track No. 2,' 'back track No. 2,' and 'back track No. 3.' It is not questioned but that these tracks, as well as the branch itself from the right of way of the main line of the railroad, are the property of, and maintained by, the H. C. Frick Coke Company, and the use of the railroad company is limited to moving in the empty cars and taking out the loaded ones. The switch tracks above designated are constructed on such grades that the use of an engine is not necessary in placing the cars to the points for loading along the coke yard. They are brought in by the engine, and located in a bunch on each of the above-named side tracks, and then distributed along at the loading places or bridges by two men with the aid of gravity and crowbars. These men are called 'car shifters,' and such was the employment of the plaintiff, and he was acting in discharge of his duties when he was hurt September 14, 1901. At an early hour that morning he was around the works, waiting for the railroad people to deliver the cars on the side track; and about four o'clock they brought in and left a number of cars on back track No. 2, and, after being advised by the freight conductor that no more cars were

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to come in on that track, the plaintiff proceeded to place them along that siding at the proper places for loading, and the railroad crew withdrew their engine from back track No. 2, and proceeded to put empty cars in on the other tracks to supply the ovens that were not reached by back track No. 2. A few minutes thereafter, while plaintiff was engaged between the rails on back track No. 2 at the end of the car from the switch connection, the car on which was loosened some kind of a hook in connection with the brake suddenly started, and the force operating to move it was of such character as to cause the car to knock him down and drive it over him, bruising and injuring him to such extent that the doctor who was at once sent for says, 'I considered the man dying when I saw him.' He was sent to the hospital, however, and, after lingering many weeks, in a measure recovered, although he insists that his injuries, which were doubtless very serious, are of a permanent character, and that, in comparison with his previous self, he is not a half a man. It was discovered that the car that ran over the plaintiff was started by being struck by some empty cars which were being pushed by the engine, intended for delivery on one of the other tracks, but through the oversight and neglect of some one the switch connecting back track No. 2 with the main siding or branch had been left open, and, instead of passing and going to the track for which they were intended, they ran in on back track No. 2, striking the cars as aforesaid, and thereby occasioning the injuries to the plaintiff.

"These are the material facts in this case, and on which the plaintiff insisted that he is entitled to recover damages for the injuries inflicted; and, in view of the authority of *Spisak v. B. & O. R. R. Co.*, 152 Pa. 281, 25 Atl. 497, we are of opinion that the case is a rather close one. If, when the conductor advised the plaintiff they were done on the track (back track No. 2), their work on the coke plant entire had been completed, and the engine and crew had left the coke company siding, and gone about other work on the main line or other branches of the railroad, and then later had returned with other empties, or for the purpose of removing loaded cars, before being advised that they were ready for removal, or for other purposes, and the accident had happened, we do not think there is any doubt but that the principles of the *Spisak Case* would prevail, and the case should have gone to the jury. But that is not this case here. Even though the conductor had told the plaintiff they were done on back track No. 2, they had not completed their work on that coke yard and the other tracks; and until they were so done it was the duty of the plaintiff and all the employees thereabouts to act accordingly until such time as the railroad crew had finished on all these tracks and left the premises. We are of opinion that under the circumstances of this case the act of

1868 (P. L. 58) applies, and the railroad crew and car shifters are, in legal effect, co-employees while working on the yard together, each performing the duties incident to their several particular employments.

"We are largely influenced in arriving at this conclusion by the principles enunciated and applied in *Cummings v. P. C. & St. L. Ry. Co.*, 92 Pa. 82, and the cases in which it has been distinguished and followed down to the present. In our opinion, the facts in the *Cummings Case* are almost exactly analogous to the facts of the case at bar. *Cummings* worked on a coalyard owned by *McCue*, the cars to which were delivered by means of a branch or side track, and then by a switch and short track into the coalyard. The coal was brought from the mines by the railroad company, and when cars got to the yard they were transferred from the main track to the side track, and from the side track in on *McCue's* track at the coalyard. A short distance from *McCue's* track there was another coalyard track, belonging to the National Coal Company, on which cars were delivered in the same way. At the time in question the railroad company brought in twelve cars on the siding, six for *McCue* and six for the National Coal Company. *McCue's* were placed on his track, and the plaintiff and another man proceeded to unload them. The locomotive then, with the other six, ran back on the side track, and, so far as *McCue's* track was then concerned, they were done until such time as they were to come for the empty cars. But their work on the siding was not yet completed. The other six were to be put in on the National Coal Company track, and for that purpose the engine with the said six cars, after having withdrawn from the *McCue* track, came ahead at a rapid rate, intending to pass *McCue's* coalyard and shove them in on the National Coal Company's siding. When the locomotive and train drew back from *McCue's* siding it was the duty of those in charge to change the switch connecting *McCue's* track with the siding so as to direct and send the train on its return past *McCue's* siding and upon the siding of the National Coal Company. This was neglected; the switch was not turned, and when the train returned it ran back again upon *McCue's* track, and collided with the cars previously left there, injuring the young man *Cummings*, who was one of the parties engaged on the cars on the *McCue* track in unloading, by which injuries he lost a leg. In the case at bar the train first passed from the main line to the side track and from the side track by switch to back track No. 2 (corresponding to *McCue's* track), and left cars (same as six left on *McCue's* track); then pulled out again on the siding for the purpose of placing cars on siding further up past switch connecting back track No. 2 with the siding. When it pulled out from back track No. 2, those in charge failed to turn the switch, same as

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in Cummings' case; and when the engine returned to place cars on other track (corresponding to National Coal Company's track), instead of passing by back track No. 2, the cars ran in on back track No. 2, collided with cars previously left there, and occasioned the injuries to the plaintiff as aforesaid. A nonsuit was entered in the Cummings Case and on appeal was affirmed. If such were not error in that case, we are of opinion that a nonsuit should stand in this."

Argued before FELL, BROWN, MESTREZAT, POTTER, and THOMPSON, JJ.

E. C. Higbee and L. A. Howard, for appellant.

N. J. Sturgis and George D. Howell, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the learned judge of the common pleas.

CHICAGO & A. R. CO. v. VIPOND.

(Supreme Court of Illinois, Oct. 24, 1904.)

[72 N. E. Rep. 22.]

Collision at Crossing of Another Railroad—Semaphore Used in Common—Immaterial Question.

Where, in an action for the death of a fireman in a collision at a crossing of another railroad by the negligence of employees in charge of a train on the latter road, the declaration alleged that there was in use by the companies a semaphore to indicate whether it was safe to pass over the crossing, but there was no charge of negligence in the management of the semaphore, or that the injury resulted from any negligence of the person in charge of it, the question whose servant such person was, was immaterial.

Same—Same—Absence of Red Light—Question for Jury.

In an action for the death of a fireman in a collision at a crossing of another railroad, due to the negligence of those in charge of a train on the latter road, the declaration alleged that, while decedent was using due care on his part, defendant negligently drove its train over the crossing when the signal indicated that it was dangerous to cross. A semaphore was in use, and at the time of the accident a white light, a signal of safety, was shown on the track on which decedent was operating an engine. There was evidence that a red light, a signal of danger, was displayed on the track of defendant, but the employees of defendant, in charge of the train which collided with decedent at the crossing, testified that the white light was shown on defendant's track: *held*, that the question whether a red light was shown on defendant's track was for the jury.

Same—Effect of Negligence of Fellow Servant on Right to Recover against Other Company.*

In an action for the death of a fireman in a collision at a crossing of another road, the negligence of the engineer in charge of the locomotive on which the fireman was employed in relying on the semaphore lights which showed a signal of safety on the track over which he was moving, without watching for a train on defendant's track, did not affect the right to recover.

*See foot-note appended to *Bodie v. Charleston & W. C. Ry. Co.* (S. Car.), 9 R. R. R. 95, 32 Am. & Eng. R. Cas., N. S., 95.

Chicago & A. R. Co. v. Vipond**Condition of Semaphore—Opinion Evidence.**

Where a witness testified that he had been over a railroad crossing many times prior to a collision at the crossing, his statement that the semaphore was in good working order was not objectionable as the conclusion of the witness.

Same—Evidence.

The tracks of two railroad companies were parallel. They were crossed by a track at about right angles. Two semaphores, working in unison by the same lever and wire, were used at the crossings. It was shown that when a red light was shown on one of the parallel tracks it was also displayed on the other: *held* that, on the issue whether a red light was shown on one of the tracks, evidence that it was shown on the adjacent track was admissible.

Death of Fireman—Effect of Engineer Running Train in Violation of Ordinance Limiting Speed.†

In an action for the death of a fireman in a collision at a crossing of the track of another road, an ordinance limiting the speed of trains is inadmissible for the purpose of showing that the train on which decedent was employed was run at a negligent rate of speed, barring a recovery, the decedent not controlling the train nor being affected by the negligence of the engineer.

Instruction Not Warranted by Evidence.

Where an engine was started 645 feet from a crossing of another railroad, so that a jury could not have found that it did not stop within 800 feet, as required by the statute, an instruction, in an action for the death of a fireman on the engine in a collision at the crossing with a train on the other road, which stated that if there was a failure to stop the engine within 800 feet of the crossing there could be no recovery, was properly refused.

Damages—Argument of Counsel—Harmless Error.

In an action for negligent killing of a person, the counsel for plaintiff stated that the income from \$5,000, especially when something was deducted for the expenses of litigation, would not be a fair substitute, when the statement was objected to. Plaintiff's counsel expressed a willingness to have it struck out if improper, and the court said it was proper to discuss the question of damages. The sentence was not completed: *held* that, though expenses of litigation could not be taken into consideration in awarding damages, the incomplete statement was not reversible error.

Appeal from Appellate Court, Second District.

Action by Nicholas Vipond, administrator of Henry Dirkes, deceased, against the Chicago & Alton Railroad Company. From a judgment of the Appellate Court (112 Ill. App. 558) affirming a judgment for plaintiff, defendant appeals. Affirmed.

C. W. Brown and A. H. Shay, for appellant.

H. H. Dicus and McDougall & Chapman, for appellee.

CARTWRIGHT, J. The tracks of the Chicago & Alton Railroad Company and of the Indiana, Illinois & Iowa Railroad Company, called the "Three I," run parallel with each

†As to whether the violation of an ordinance limiting speed of trains is negligence, see foot-note appended to *Omaha St. Ry. Co. v. Larson* (Neb.), 12 R. R. R. 643, 35 Am. & Eng. R. Cas., N. S., 643.

As to whether an engineer is a vice principal with respect to the other members of his train crew, see note at end of case.

other in the city of Streator, and about 75 feet apart. Said tracks are crossed by the double tracks of the Atchison, Topeka & Santa Fe Railroad Company nearly at right angles. There is a semaphore at the crossing of the Chicago & Alton, and another at the crossing of the Three I, by which the use of the crossings is regulated. At night there are two lamps in each semaphore, and both semaphores are operated by the same lever by means of a wire running near the ground. When the semaphores are in one position, the lamps show white lights on the tracks of the Santa Fe and red lights on the tracks of the Chicago & Alton and Three I. When placed in the other position by means of the lever, they show red lights on the Santa Fe and white lights on the other roads. A red light is a signal of danger, and shows that the crossing cannot be used by the road on which it is displayed, and, when shown, it is the duty of the engineer to stop before reaching the crossing. A white light is a signal of safety, showing that trains approaching on the road where it is displayed have the right of way. When the safety signal is displayed on the Santa Fe, danger signals are necessarily shown on the other roads. These signals had regulated the use of the crossings for eight or nine years before December 27, 1899, and at night had stood with the white light for the Santa Fe, unless the crossing was called for by an engineer on one of the other roads, when the position was changed, showing the red light on the Santa Fe, and after the train had passed the lights were restored to their former position. On the morning of that day, at about 1:40 a. m., a switch engine on the Santa Fe, backing and hauling freight cars, and a passenger train of appellant, came in collision on the crossing, and Henry Dirkes, fireman on the Santa Fe engine, received injuries from which he died. The passenger train was a regular one, and was on time. Appellee was appointed administrator of the estate of Henry Dirkes, and brought this suit in the circuit court of La Salle county to recover damages for his death. There were three counts in the declaration, the second and third of which were withdrawn on the trial, and the first alleged the use of the semaphore at the crossing to indicate to those in charge of locomotives and trains safety or danger in passing the crossing; that the white light indicated safety, and the red danger; that the semaphore showed a white light on the Santa Fe and a red light on the Alton; and that the train on the Alton was carelessly and improperly driven over the crossing without stopping, causing the collision and injuries from which Dirkes died. Upon the trial there was a verdict for \$5,000, on which judgment was entered, and the judgment was affirmed by the Appellate Court for the Second District.

At the close of the evidence the defendant moved the court to direct a verdict of not guilty, and the court denied the motion. It is insisted that there was manifest error in this

ruling for several reasons. The declaration alleged that the semaphore was under the care and operated by servants of the railroads, while the evidence showed that it was in the charge of an employee of one of them—the Santa Fe Company. It was a material averment that there had been erected and was in use by the companies a semaphore to indicate whether it was safe to pass over the crossing, and this averment was proved; but there was no charge of negligence in the management of the semaphore, or that the injury resulted from any fault or neglect of the person in charge of it, so that the question whether such person was the servant of one or both was wholly immaterial. The averment being immaterial, it was not necessary to prove it.

The declaration also averred that, while Dirkes was using due care on his part, the servants of the defendant carelessly and improperly drove and ran its train over the crossing when the red light indicated that it was dangerous to cross. It is insisted that the record is barren of any evidence to support the declaration that the red light was shown on the Alton track. The semaphore had been in use for many years, controlling the movement of trains over the crossing, and its construction was such that whenever a white light was displayed on the Santa Fe a red light was necessarily shown on the Alton, and a number of witnesses testified that such was the fact in its operation. There was considerable testimony, wholly uncontradicted, that the white light was shown on the Santa Fe before and at the time of the collision. Furthermore, the semaphores at the Alton crossing and the Three I crossing were operated by the same lever, and showed the lights at the two crossings in the same way at the same time. It was proved that at the time of the collision a red light was shown on the Three I by the semaphore at that crossing. The only ground for saying that there was no evidence that there was a red light displayed on the Alton is the fact that the engineer, fireman, conductor, and brakeman on the Alton train testified that while at the depot, and before starting toward the crossing, the light at the semaphore was white, and the engineer and fireman testified that it continued white up to the collision. It cannot be said as a matter of law that, because these witnesses so testified, the evidence for the plaintiff did not tend to prove the contrary. Indeed, it is quite clear that unless something had recently happened to the semaphore a red light was shown on the Alton track. There was no evidence tending to show that the condition of the semaphore had changed, or that it was not in working order, as it had been up to that time. On the contrary, there was evidence that it was in its usual working order. The question whether a red light was shown on the Alton track was one of fact, which was properly submitted, in the first instance, to the jury.

It is also urged that Dirkes, being a fireman on the Santa Fe engine, was guilty of negligence in not being on the lookout for the Alton train; that the engineer was negligent in relying entirely on the semaphore light, and not also watching for a train on the Alton; and that if the engineer was negligent the plaintiff could not recover. The evidence does not show exactly what Dirkes did in the way of watching for a train on the Alton track, but the view was obstructed to some extent, although to what extent was a controverted question on the trial. The evidence would not warrant the court in saying, as a matter of law, that Dirkes was guilty of negligence. The testimony of the engineer shows that his reliance was on the semaphore lights which regulated the use of the crossings; but, if he ought to have been watching the Alton track as well as the semaphore lights, Dirkes was not responsible in any way for his negligence, and the right to recover would not be affected by it. There was no error in refusing to direct a verdict.

It is next argued that the court erred in permitting witnesses for the plaintiff, who said they had been over the crossing frequently that night, to testify that the semaphore was in good working order and working all right. The semaphore at the Alton crossing was torn down in the collision, and its condition could not be proved except as it was found after the accident, when the nine-inch red glass in the arm was unbroken. The objection is that the witnesses stated conclusions, and not facts; that they ought to have explained the mechanism of the semaphores, the condition of the mechanical contrivances, and what they did in the way of observing or examining them that night. We do not regard the testimony as mere conclusions, but rather as statements of fact that the semaphores were in their usual condition and working as usual. What the witnesses knew about the subject was made plain on the cross-examination.

The court admitted evidence that a red light was shown on the Three I track at the time of the accident, and it is insisted that this was error. It was proved that the two semaphores worked in unison by the same lever and wire, and when a red light was shown on the Three I a red light was displayed on the Alton at the same time. The fact that a red light was shown on the Three I, therefore, tended to prove that the semaphore was in such position that the red light was also shown on the Alton. Unless the semaphore at the Alton crossing had become out of order—of which there was no presumption—the red lights were necessarily shown on the two roads at the same time.

The court refused to admit in evidence an ordinance of the city of Streator limiting the speed of an engine or car, other than a passenger train, to six miles per hour. The Santa Fe engineer testified that he was running seven or eight miles an hour at the time of the collision, and it is insisted that

the rate of speed was negligence which would bar a recovery, and therefore the court erred in not admitting the ordinance. Dirkes, the fireman, was not in charge of the engine nor controlling its speed, and if there was negligence in that respect it was that of the engineer. If such negligence caused or contributed to the accident, it would not excuse the Alton for an injury to one who was without fault or negligence. Counsel refer to the case of *City of Joliet v. Seward*, 86 Ill. 402, 29 Am. Rep. 35, as sustaining the claim that one who has put himself in the care of another is responsible for the negligence of such other person, and cannot recover for an injury to which the negligence of that person has contributed. In this case Dirkes had not put himself under the care of the engineer to be carried over the crossing, and, if he had, a different rule was laid down in the later cases of *Wabash, St. Louis & Pacific Railway Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791, *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688, and *Chicago City Railway Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76.

Next, it is urged that the court erred in giving and refusing instructions, and it is said that the instruction given at the instance of the plaintiff assumed the fact that Dirkes was exercising ordinary care for his own safety. The instruction did not assume the existence of such fact.

The court refused instructions, based on the statute requiring an engine to come to a full stop within 800 feet of the crossing of another railway, which stated that if there was a failure to stop the Santa Fe engine within that distance plaintiff could not recover. The evidence was undisputed that the Santa Fe engine was started 645 feet from the crossing, so that the jury could not have found that it did not stop within 800 feet, and it was not error to refuse those instructions.

Instruction No. 19 tendered by the defendant stated that negligence of the engineer on the switch engine would be attributable to Dirkes as his negligence. We have already alluded to that question, but the court gave the second and third instructions asked by the defendant stating a rule exactly as contended for by counsel, and prohibiting a recovery if the engineer was guilty of negligence contributing to bring about the collision. Certainly the defendant had no ground of complaint on that question.

In the argument to the jury counsel for plaintiff commenced a statement that the income from \$5,000, especially when something was deducted for the expenses of litigation, would not be a fair substitute, when the statement was objected to by counsel for defendant. The counsel making the argument expressed a willingness to have it struck out if not proper, and the court said he thought it proper to discuss the question of damages. The sentence was never

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completed, and, while the expenses of litigation could not be taken into consideration in awarding damages, there was no further argument on that basis, and we do not think the judgment should be reversed on account of what was said in the incomplete statement. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

NOTE.

FELLOW SERVANTS—ENGINEERS AND OTHER MEMBERS OF SAME TRAIN CREW.

It will be found from an examination of the authorities in this note that, in most jurisdictions, an engineer of a railroad locomotive is held to be the fellow servant of the other members of the crew of his train. In other jurisdictions, however, the question is affected by the prevalence of the different-department limitation of the fellow-servant rule (see foot-note appended to *Indianapolis & G. R. T. Co. v. Foreman* (Ind.), 11 R. R. R. 214, 34 Am. & Eng. R. Cas., N. S., 214), and in others a conflict between the decisions is due to the influence of *Chicago M. & St. P. Ry. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, which has been practically overruled in *New England R. Co. v. Conroy* (U. S.), 16 Am. & Eng. R. Cas., N. S., 380. In others the superior-servant doctrine is controlling in many of this class of cases.

WHETHER FELLOW SERVANT OF BRAKEMAN.

UNITED STATES.

Are Fellow Servants.

Injury to Car Coupler—Drilling Cars.

Conductors, car couplers, and engineers, when engaged in drilling cars in a railroad yard, are all fellow servants of each other. So held in *Cent. R. R. of New Jersey v. Keegan* (C. C. A.), 82 Fed. 174.

Brakeman Injured While Coupling—Negligence in Backing Cars.

In *Hines v. Union Pac. R. Co.* Fed. Cas. No. 6,521, it is held that a brakeman injured while coupling cars, by the negligence of the engineer of his train in backing a section of it with undue force, cannot recover against the railroad company, as the negligence was that of his fellow servant.

Brakeman Injured While Coupling—Negligence in Moving Section of Train.

In *Miller v. Baltimore & O. R. Co.*, (C. C.), Fed. Cas. No. 9,560, it is held that a brakeman injured while coupling cars cannot recover from the company, if the cause of the accident was the negligence of the engineer of the train, his fellow servant, in moving a section of the train.

Brakeman Injured—Failure to See That Way Was Clear at Junction.

Where a brakeman is injured through the negligence of the engineer of his train, in failing to obey a rule of the company requiring him to see that the way is clear at junctions, he is injured through the negligence of a fellow servant. So held in *New Jersey & N. Y. R. Co. v. Young* (C. C. A.), 49 Fed. Rep. 723.

Injury to Brakeman—Engineer as Conductor of Section of Parted Train.

In *Newport News, etc., R. Co. v. Howe* (C. C. A.), 52 Fed. 362, it appeared that, under the rules of the company, when a train parted and the conductor was on the rear portion, the engineer became the conductor of the forward portion; and that after a train parted the

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conductor sent a brakeman from the rear section to signal the forward section. It was held that such brakeman was a fellow servant with the engineer while the latter was acting as conductor, and could not recover from the company for his negligence.

Coupling by Hand—Absence of Conductor—Engineer without Authority to Waive Rule.

In *Richmond, etc., R. Co. v. Finley* (C. C. A.), 63 Fed. 229, it is held that there can be no recovery for injuries sustained by a brakeman while coupling cars by hand, in obedience to the orders of the engineer, who was in charge of the cars during the absence of the conductor, as the engineer had no authority to waive a rule of the company prohibiting the coupling and uncoupling of cars by hand.

Not Fellow Servants.

Brakeman Injured in Collision—Failure to Obey Train Dispatcher's Orders.

In *Northern Pac. R. Co. v. Cavanaugh* (C. C. A.), 51 Fed. Rep. 517, it is held that a brakeman injured in a collision is not the fellow servant of the conductor and engineer of his train, whose negligence, in disobeying the train dispatcher's orders caused the accident.

CALIFORNIA.

Injury to Person Acting as Brakeman and Conductor—Coupling Cars—Sudden Movement of Cars.

A person employed as the conductor and brakeman of a train is the fellow servant of its engineer; and there can be no recovery against the railroad for injuries sustained by the former by reason of the negligence of the engineer in moving the cars without a signal from the conductor, while the latter was making a coupling. So held in *Long v. Coronado R. Co.*, 96 Cal. 269, 31 Pac. 170.

COLORADO.

Brakeman Injured—Sudden Movement of Cars.

A brakeman cannot recover for injuries sustained by reason of the sudden movement of cars, through the negligence of the engineer of his train, his fellow servant. So held in *Summerhays v. Kansas Pac. Ry. Co.*, 2 Colo. 484.

FLORIDA.

Injury to Brakeman—Negligence of Engineer in Putting Engine in Charge of Fireman.

In *South Florida R. Co. v. Price*, 32 Fla. 46, 13 So. 638, it was held that the engineer, fireman, and brakeman of the same freight train were fellow servants; and that, in the absence of statute law, the company was not liable to one of such fellow servants for injuries sustained in the line of his employment through the negligence of the engineer in putting his unskilled or careless fireman to the performance of his duty of handling the engine.

GEORGIA.

Injury to Brakeman.

In *Taylor v. Georgia Marble Co.*, 99 Ga. 512, 27 S. E. 768, it was held that the company was liable for injury to a brakeman resulting from the negligence of the engineer, who had entire charge and management of the train, and sole control over the brakeman.

Brakeman Injured—Negligence in Operating Train.

There can be no recovery against the company for injuries to a brakeman resulting from the negligence of the engineer of his train in operating it, as they are fellow servants. So held in *Bell v. Globe Lumber Co.*, 107 La. 725, 31 So. 994.

ILLINOIS.

Brakeman Injured—Train Run into Open Switch.

Although an engineer has authority over a brakeman of his train,

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they are fellow servants, and the railroad company is not liable for injuries sustained by the brakeman through the negligence of the engineer in allowing his train to run through an open switch and on to a passing track. So held in *Illinois Cent. R. Co. v. Swisher*, 61 Ill. App. 611.

Brakeman and Shovelers on Construction Train.

In *Railway Co. v. Britz*, 72 Ill. 256, it was held that the engineer, brakeman, and shovelers on a construction train were fellow servants.

Derailment Caused by Defective Wheels—Engineer's Knowledge of Defects Not Notice to Brakeman.

In *Illinois Cent. R. Co. v. Pirtle*, 47 Ill. App. 498, it is held that notice to an engineer of defects in wheels which cause the train to be thrown from the track, and kill a brakeman is not notice to the brakeman; and the doctrine of follow service does not apply where the accident was not due to the negligence of the former in running the train.

INDIANA.

Injury to Servant Uncoupling Cars—Negligence in Management of Train.

A railroad employee, whose duties are various, is, while performing his duty of uncoupling cars, the fellow servant of the engineer of the train, being engaged in the same general undertaking; and cannot recover against the company for personal injuries resulting from the negligence of the engineer in managing the train. So held in *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226.

IOWA.

Brakeman Injured While Uncoupling—Negligence in Operating Train.

A brakeman injured through the negligence of the engineer in operating the train, while he was uncoupling cars, is a fellow servant of the engineer. So held in *Sloan v. Central Iowa Ry. Co.*, 62 Iowa 728, 16 N. W. 331.

KENTUCKY.

Engineer Superior of Brakeman.

In *Louisville, etc., R. Co. v. Brooks*, 83 Ky. 129, it is said in the opinion: The engineer and brakeman on the same train are not, as assumed by counsel, coequals; for the latter has no right to resist the former, when acting in his appointed sphere, but is bound to implicitly obey his signals; and, as between them, there is no reason or consideration of policy to imply, on the part of the brakeman, an undertaking to look to the engineer alone, and not to the company, for security against his willful neglect, even conceding such should be the rule as between coequals. In our opinion, therefore appellee has a right to maintain this action for the cause stated in his petition."

Brakeman Injured by Violent Backing of Cars—Fireman Acting as Engineer.

Where it is the custom of the common master to permit fireman to act as engineers in coupling and switching trains, a fireman, when so acting, is, in law, the engineer, and not the fellow servant of a brakeman of the train, and the master is responsible for injuries to the latter caused by the negligence of the fireman in violently backing one section of the train against the other section. So held in *Louisville & N. R. Co. v. Moore*, 83 Ky. 675, 24 Am. & Eng. R. Cas. 443.

Gross Negligence of Engineer.

In *Louisville, etc., R. Co. v. Robinson*, 4 Bush. (Ky.) 508, it is held that a railroad company is liable for injury to a brakeman sustained by reason of the gross negligence of the engineer of his train.

Killing of Brakeman—Negligence of Fireman Acting as Substitute for Engineer.

In *Louisville & N. R. Co. v. Sullivan's Adm'r* (Ky.), 76 S. W.

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525, 11 R. R. R. 131, 34 Am. & Eng. R. Cas., N. S., 131, it is held that a brakeman on a freight train is not the fellow servant of the fireman of the train while the latter is temporarily performing the duties of the engineer.

Engineer as Representative of Company—Rationale of Doctrine.

In *Louisville & N. R. Co. v. Collins*, 63 Ky. 114, it is said in the opinion: "In the use and control of the engine, the engineer is the chief and governing agent of the corporation, and all his associates in that employment are employees in a common service. Neither of these subordinates under his control is, as between themselves, an agent of the railway company; and therefore, it is not responsible for any damage done by one of them to another, while in its service; and, so far, the British rule has foundation in both reason and analogy; but beyond this, it is baseless of any other support than a falsely assumed public policy or implied contract. In the employment and control of his subordinates, the engineer acts as the representative agent of the common superior. They have no authority to control or resist him in his allotted sphere of service; and why, then, should the law imply a contract to trust him alone, and never look to the corporation, as his employer and constituent, for indemnity for damage resulting from his willful wrongs or grossly negligent omissions."

LOUISIANA.

Fellow Servants.**Brakeman Injured While Coupling Cars—Negligence in Operating Engine.**

A brakeman, while coupling cars, is the fellow servant of the engineer; and cannot recover for injuries resulting from the negligence of the latter in operating the engine. So held in *Wallis v. Morgan's L. & T. R. & S. Co.*, 38 La. Ann. 156.

MICHIGAN.

Brakeman Injured—Loose Engine Step.

A brakeman injured through the negligence of the engineer of his train in allowing the engine step to become and remain loose, is the latter's fellow servant, and cannot recover for such injury. So held in *Miller v. Chicago & G. T. Ry. Co.*, 90 Mich. 230, 51 N. W. 370.

Brakeman Injured While Uncoupling—Starting Cars without Waiting for Signals.

A brakeman is a fellow servant of the engineer of his train, and cannot recover against the company for injuries resulting from the negligence of the engineer in suddenly starting the engine without waiting for a signal, while the brakeman was uncoupling cars. So held in *Stanley v. Chicago & W. M. Ry. Co.*, 101 Mich. 202, 59 N. W. 393.

MINNESOTA.

Injury to Brakeman.

In *McLaren v. Williston*, 48 Minn. 299, 51 N. W. 373, it was said in the opinion: "that the plaintiff, a brakeman, took the risk of the negligent act or conduct of his fellow servant, the engineer, in the common employment."

MISSISSIPPI.

Injury to Car Coupler—Failure to Provide Sand for Rails.

In *Illinois Cent. R. Co. v. Jones (Miss.)* 16 So. 300, it is held that there can be no recovery against the company for an injury sustained by a brakeman, while coupling cars, through the failure of the engineer of the train to perform the duty of providing sand to put on the rails.

Brakeman Injured—Empty Sand Box.

An engineer is the fellow servant of a brakeman on his train, and

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the latter cannot recover against the common master for personal injuries sustained by him through the negligence of the engineer in failing to see that the sand box was empty before the train was started. So held in *Louisville, New Orleans & T. Ry. Co. v. Petty*, 67 Miss. 255, 7 So. 351.

MISSOURI.

Brakeman Injured While Coupling—Cars Suddenly and Violently Backed.

There can be no recovery against the railroad for injury to a brakeman, sustained while he was coupling cars, through the negligence of the engineer of his train, his fellow servant, in backing it too violently and suddenly. So held in *Dysart v. Kansas City, Ft. S. & M. R. Co.*, 145 Mo. 83, 46 S. W. 751.

Brakeman of Switch Crew and Engineer of Switch Engine.

In *Warmington v. Atchison, etc., R. Co.*, 46 Mo. App. 159, it is held that the brakeman of a switch gang is a fellow servant of the engineer in charge of the switch engine.

NEW YORK.

Brakeman Injured in Collision—Excessive Speed.

There can be no recovery for the death of a brakeman in a collision resulting from the negligence of the engineer of his train, his fellow servant, in running it too fast. So held in *Morgan v. New York Cent., etc., R. Co.*, 67 N. Y. 96.

Brakeman Injured—Excessive Speed.

In *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153, it is held that a brakeman who has no right to apply the brakes except when directed by the engineer or conductor, is their fellow servant, and cannot recover against the common master for an injury sustained by reason of the negligent speed at which the engineer and conductor ran the train.

Brakeman Injured in Collision—Excessive Speed at Station.

A brakeman cannot recover for injuries received in a collision, which was the result of the negligence of the engineer, his fellow servant, in attempting to pass a station at a high rate of speed, without ascertaining that another train was so situated as to permit him to do so with safety. So held in *Wright v. New York Central R. Co.*, 25 N. Y. 562.

NORTH CAROLINA.

Fellow Servants.

Brakeman Injured—Negligence in Permitting Boy to Operate Engine.

A brakeman is the fellow servant of the engineer of his train, and cannot recover against the railroad company for injuries caused by the negligence of the engineer in permitting an inexperienced and careless boy to operate the locomotive. So held in *Hagins v. Cape Fear & Y. V. Ry. Co.*, 106 N. Car. 537, 11 S. E. 590.

Injury to Brakeman.

In *Hagins v. Cape Fear, etc., R. Co.*, 106 N. Car. 537, 11 S. E. 590, it appeared a brakeman was injured through the negligence of the engineer. The complaint simply set out the fact of the injury without any allegation of facts to take the case out of the law of coservice. It was held that the brakeman and engineer were fellow servants, and that the complaint did not state facts sufficient to constitute a cause of action.

Injury to Brakeman—Sufficiency of Complaint.

In *Hobbs v. Atlantic, etc., R. Co.*, 107 N. Car. 1, 12 S. E. 124, 44 Am. & Eng. R. Cas. 592, it is held that a brakeman injured through the negligence of the engineer of his train is the latter's fellow servant, and, in an action for such injury, where the complaint contains no allegation that the company exposed the plaintiff to unusual and unnecessary risks, or that, after it knew the engineer

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was incompetent and unfit, they retained him in their service, a demurrer to such complaint should be sustained.

Not Fellow Servants.

Injury to Brakeman Subject to Engineer's Orders.

Though a brakeman is presumed on entering service to assume all risks materially incident thereto, no such presumption arises as to such risks, as those which grow out of the possible negligence of the engineer of his train, who stands, as to the brakeman, in the light of a superior, whose commands and directions he is bound to obey. So held in *Cowles v. Richmond, etc., R. R. Co.*, 84 N. Car. 309, 2 Am. & Eng. R. Cas. 90.

OHIO.

Brakeman Required to Operate Brakes According to Engineer's Signals.

In *Pittsburg, etc., R. Co. v. Lewis*, 33 O. St. 196, there was no proof that a brakeman was subordinate to an engineer of the same train except a rule of the company requiring the engineer to give certain signals as a notice to apply or loosen the brakes, and requiring the brakeman to manage the brakes "according to circumstances and the signals of the engineer," and placing the brakeman while on the train in subordination to the conductor. It was held not sufficient to show the relation of superior and subordinate servant, and that the brakeman and engineer were fellow servants.

Brakemen Injured While Removing Brakes in Obedience to Engineer's Signals—Sudden Movement of Train—Superior Servants.

A brakeman, by the rules of the company, was placed under the control and direction of the conductor; and one of such rules required the engineer to give certain signals for setting or relieving brakes, and required brakemen to work brakes according to such signals. It was held that the last-mentioned rule did not, as between the engineer and brakeman, create the relation of superior and subordinate; but that they were fellow servants; and the brakeman could not recover for injuries sustained by reason of the negligence of the engineer in suddenly applying steam before the brakeman had a reasonable time to remove brakes in obedience of the engineer's signals. *Pittsburg, C. & St. L. Ry. Co. v. Ranney*, 37 O. St. 665, 5 Am. & Eng. R. Cas. 533.

Engineer Charged with Duty of Signaling for Brakes—Superior-Servant Rule Not Applicable.

In *Railway v. Ranney*, 37 O. St. 665, 5 Am. & Eng. R. Cas. 533, the question before the supreme court of Ohio was whether an engineer who gave the signal for the brakeman to take off the brakes was, in so doing, exercising any authority over the latter. Upon the question it is said in the opinion: "Indeed, the only pretense found in the testimony for the claim of defendant in error that brakemen are subordinate to the engineer of the train is found in the fact that it is the duty of brakemen to observe and obey certain signals given by the engineer, to wit (rule 18): 'one long blast of the whistle is the warning of the approach of a train; one short blast is a signal for putting down brakes and stopping the train; two short blasts, for releasing the brakes and starting the train; three for backing the train.' It is contended that the signals are in the nature of orders or commands which the engineer is authorized to give to brakemen, which they are bound to obey, and hence the relation of superior and subordinate is created. A majority of the court do not so understand either the purpose or effect of the rule. These signals are so named properly, and are intended to notify all concerned of the thing signified. They are addressed to the conductor as well as to the brakemen, and it is the duty of the conductor to see that brakemen perform the duty signified. The duty is imposed upon the brakemen by force of the rule itself, and not by virtue of any authority vested in the engineer over the brakemen."

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The signal is a mere notice. The rule is the order of the company to the brakemen directly. Suppose a train is signaled by a station agent, as this train was, to stop for orders. It thereby becomes the duty of the conductor, as well as of each employee on the train, to stop for orders; and yet no one can contend that such station agent who gives the signal is the superior, and the train crew subordinate employees of the company, within the meaning of the rule under consideration. A variety of signals, under a variety of circumstances, are required to be given by different employee's of the company, to signify that an occasion exists for the performance of a particular duty; but it would be absurd to hold that in each case the employee giving the signal is a superior servant, to whom all others to whom information is thus communicated are subordinated, so that the company would be responsible to them for any act of negligence of the employee who gave the signal, whether such negligence was in giving the signal, or in the performance of other duties."

Injury to Brakeman—Superior-Servant Rule Not Applicable.

Even in jurisdictions which adhere to the rule that where the master places one servant in a position of subordination to another servant, and the former, without fault on his part, is injured through the negligence of the superior servant, the master is liable, it is held that the engineer cannot, under ordinary circumstances, be considered as superior to the brakeman. See *Pittsburg, etc., R. Co. v. Lewis*, 33 O. St. 196; *Pittsburg, etc., R. Co. v. Ranney*, 37 O. St. 665; *Pittsburg, etc., R. Co. v. Devinney*, 17 O. St. 197.

PENNSYLVANIA.

Brakeman Killed in Collision.

There can be no recovery for the death of a brakeman caused by the negligence of the conductor and engineer of his train, his fellow servants, in failing either to side track train or to give proper signals to an approaching train. So held in *Hoover v. Beech Creek R. R.*, 154 Pa. St. 362, 26 Atl. 315.

SOUTH CAROLINA.

Brakeman Injured by Sudden Movement of Cars.

The engineer and coupler of a freight train are fellow servants, and for injury to the coupler from the negligence of the engineer, in moving the cars while the brakeman was making a coupling, the common master is not liable. So held in *Boatwright v. Northeastern R. Co.*, 25 S. Car. 128.

In this case it is said in the opinion: "The plaintiff and the engineer were both co-operating, and necessarily co-operating, to bring about the same end, the coupling of the cars. The engineer was required to move back the train by the agency of his engine, and the plaintiff was required to take position between the cars as the train was moved back, so as to secure them together by the coupling apparatus, and it seems to us that these two employees acting under common orders to secure the same result, the action of both being necessary to that end, must be regarded as fellow servants."

Brakeman Injured While Coupling—Negligence in Pushing Cars Together.

The engineer and brakeman of a freight train are fellow servants, so that the latter cannot recover against the common master for the negligence of the engineer in pushing cars together with undue force while the brakeman was making a coupling. So held in *Evans v. Chamberlain*, 40 S. Car. 104, 18 S. E. 213.

TENNESSEE.

Fellow Servants.**Injury to Car Coupler—Moving Train—Order of Engineer.**

In *East Tennessee, etc., R. Co. v. Smith*, 89 Tenn. 114, 14 S. W. 1077, it appeared that the injured employee was a brakeman and was hurt while undertaking to couple a moving train. He alleged that

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he was ordered to make the coupling by the engineer. The train was in charge of the conductor. It was held that the engineer and brakeman were fellow servants; and that the company was not responsible for the negligence of either, by which the other was injured, there being no proof of the incompetency of either employee.

Injury to Brakeman—Absence of Conductor—Negligence of Engineer Having, but Not Exercising, Control.

In *Hopkins v. Nashville, etc., R. Co.*, 96 Tenn. 409, 34 S. W. 1029, it is held that where the conductor of a train is absent, and its engineer and brakeman perform the duties required of them by the rules of the company in such an emergency, independently of each other, and the engineer, though he has a right to do so, exercises no control over the brakeman, and the latter is injured through the engineer's negligence, there can be no recovery against the railroad company.

Brakeman Injured by Reason of Sudden Movement of Train While Ascending Car—Train in Charge of Conductor.

Where the conductor is in charge of a train, and the other trainmen are subject to his control and must obey his orders, a brakeman in such train is the fellow servant of its engineer; and the company is not liable for injuries sustained by him through the negligence of the engineer in causing a sudden jam of the cars while the brakeman was ascending one of them. So held in *Railroad v. Kenley*, 92 Tenn. 207, 21 S. W. 326.

Brakeman Injured by Backing Cars While Coupling.

The engineer is the fellow servant of the brakeman of his train, so that there can be no recovery against the common master for injuries to the brakeman, sustained while he was coupling cars, through the negligence of the engineer in violently backing a section of the train without warning. So held in *Nashville, C. & St. Louis R. Co. v. Wheelless*, 78 Tenn. 741.

Not Fellow Servants.

Brakeman Injured by Backing Cars While Coupling.

An engineer in charge of a train is not the fellow servant, but the superior, of a brakeman of his train acting under his orders; and the company is liable for injuries to the brakeman resulting solely from the negligence of the engineer in backing cars while the brakeman was making a coupling. So held in *East Tennessee & W. N. C. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. 883.

Injury to Brakeman—Engineer with Control over Train and Crew.

In *East Tennessee, etc., R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. 883, the court lays down the doctrine as established in the state by the case of *Nashville, etc., R. Co. v. Wheelless*, 10 Lea (Tenn.) 741, 15 Am. & Eng. R. Cas. 315, as follows: "The case is not only not authority for such position, but is directly contrary. The facts were that the conductor, who was in control of the train, and who was the common superior of both the engineer and the brakeman, had given orders that the train be coupled up, and gone into the depot to attend to other business. In obeying his orders the engineer and brakeman were acting when the accident occurred, and they were clearly fellow servants, at that time engaged in a common employment, under a common superior, and the company was not liable to either for injury occasioned by the negligence of the other. But it is expressly said in that case (and the reasoning and the obvious propriety of the rule makes the expression unnecessary) that 'of course, in some cases, a railroad company may be held liable to a brakeman for the negligence of an engineer) as where the former is, in fact, acting under the orders of the latter. We do not mean to hold that the relation of superior and inferior may not, in some cases, exist between them—only that it did not, in this case, so far as the record shows.' Upon its facts the *Wheelless* case was manifestly right, and to the facts of this case it clearly has no application. The engineer was in charge of the train and all the servants upon it. Whatever

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they did was under his orders, and he was the superior of plaintiff, as averred."

Injury to Brakeman under Engineer's Control.

An engineer is not the fellow servant of a brakeman of his train, but his superior, where the latter is acting under the orders of the engineer. So held in *Nashville, C. & St. L. R. Co. v. Wheless*, 78 Tenn. 741.

TEXAS.

Are Fellow Servants.**Brakeman Injured—Negligence in Backing Cars.**

The railroad company is not liable for injuries to a brakeman, sustained while he was coupling cars, through the negligence of the engineer of his train, his fellow servant, in backing up cars. So held in *Houston & T. C. R. Co. v. Willie*, 53 Tex. 318.

Brakeman Injured—Negligent Operation of Train.

A brakeman cannot recover against the common master for injuries caused by the negligent operation of his train by its engineer, his fellow servant. So held in *Houston & T. C. Ry. Co. v. Gilmore*, 62 Tex. 391.

Brakeman Injured—Failure to Give Danger Signal—Engineer without Authority over Brakeman.

In *International & Great Northern R. Co. v. Moore*, 16 Tex. Civ. App. 51, 41 S. W. 70, it appeared that a brakeman on a freight train went forward to the engine to obtain directions from the engineer, and while on the engine it was derailed and he was injured; that had the engineer given the proper danger signals, the brakeman would not have gone to the engine, and had he not gone there, he would not have been injured; and that a rule of the company made it the duty of the brakeman to take their directions and orders from the conductor, but, as a matter of convenience, they often got them from the engineer. It was held that, as the engineer had no right of authority or control over the brakeman, they were fellow servants and the company was not liable for the injury.

Killing of Brakeman—Collision between Sections of Train.

In *Louisiana W. E. Ry. Co. v. Carstens* (Tex. Civ. App.), 12 Am. & Eng. R. Cas., N. S., 781, it is held that a brakeman is the fellow servant of the engineer of his train, so as to prevent recovery against the company for injuries sustained by the brakeman, resulting solely from the negligence of the engineer in failing to do what should have been done to stop cars to prevent a collision between sections of the train.

Brakeman Injured—Negligent Management of Train.

In *Texas & New Orleans R. Co. v. Berry*, 67 Tex. 238, 5 S. W. 817, it is held that a brakeman cannot recover for injuries sustained by reason of the negligence of the engineer of his train, his fellow servant, in operating it.

Engineer Charged with Duty to Signal for Operation of Brakes—Death of Brakeman.

In *Texas Cent. R. Co. v. Frazier* (Tex.), 4 Am. & Eng. R. Cas., N. S., 664, it is held that an engineer whose duty it is to give signals to the brakeman of his train, in accordance with the rules of the railroad company, in reference to the use of the brakes, is a fellow servant of such brakeman. In this case it is said in the opinion: "We are of the opinion that the signal given by the engineer for brakes was a mere notice to the brakeman Frazier that the occasion had arisen for him to perform a duty imposed upon him by the rules; that the fact that the engineer was intrusted by the company with the discretion of determining when the brakes should be applied, and to signal therefor, did not give him any 'authority of superintendence, or control or command or authority to direct Frazier in the performance of his duties; that Frazier, in attempting to set

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brakes in the performance of his duties, was governed and controlled by the direction and command of the rule, and not by the engineer; and that, therefore, under the statute, they were in the same grade of employment, and fellow servants."

Are Not Fellow Servants.

Injury to Brakeman—Failure of Engineer to Inspect Engine and Couplings.

Where a brakeman is injured through the failure of the engineer of his train to inspect the engine and see that couplings were in a safe condition, the railroad company is liable, as such negligence is not that of the brakeman's fellow servant, but of the company's representative. So held in *Sabine & East Texas Ry. Co. v. Ewing*, 1 Tex. Civ. App. 531, 21 S. W. 700.

UTAH.

Injury to Car Coupler—Fireman Put in Charge of Engine.

In *Brown v. Southern Pac. Co.*, 7 Utah 288, 26 Pac. 579, it is held that an engineer who puts a fireman in charge of an engine is a viceprincipal, and not a fellow servant, of a brakeman coupling the engine to another engine.

VIRGINIA.

Brakeman of Shifting Crew Injured While between Cars.

In *Eckles v. Norfolk & W. R. Co.*, 96 Va. 69, 25 S. E. 545, it is held that there can be no recovery against the common master for injuries to the brakeman of a shifting crew sustained while he was between cars, through the negligence of the engineer of the crew, his fellow servant, in operating the engine.

Brakeman Injured While Coupling—Negligence in Driving Back Train Second Time.

There can be no recovery against the railroad company for injuries sustained by a brakeman, while coupling cars, through the negligence of the engineer of his train, his fellow servant, in driving back the train the second time. So held in *Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496.

Brakeman Killed—Negligence in Making Flying Switch.

But where the death of a brakeman is the result of the negligence of an inexperienced fireman, who had been left in charge of the engine by the engineer, with the permission of the conductor, who was the alter ego of the company, in improperly managing the engine while making a flying switch, the company is liable on account of such permission given by the conductor. So held in *Norfolk & W. R. R. Co. v. Thomas' Adm'r*, 90 Va. 205, 17 S. E. 884.

WEST VIRGINIA.

Brakeman Injured—Negligence in Permitting Fireman to Handle Engine.

The act of an engineer in putting an inexperienced and incompetent fireman in charge of an engine is a breach of duty the company owes to its employees to exercise ordinary care in employing competent servants, so as to render it liable to a brakeman of the train for injuries sustained by reason of the negligent management of the train by such fireman. So held in *Core v. Ohio River R. R. Co.*, 38 W. Va. 456, 18 S. E. 596. In this case it is said in the opinion: "The employees of a railroad company often times occupy not only a dual, but a three fold relation towards each other, according to the duties they are called upon or delegated to perform, to wit: that of superior or master, co-ordinate or fellow servant, inferior or servant. For instance, in running the train, the conductor is the superior of the engineer, and in that particular he represents the master; in the separate management of the engine and the train from the engine back they are co-ordinate or fellow servants, each being independent in his own sphere; and in permitting the fireman or other person to man-

Note

age the engine in his stead the engineer is the superior of the conductor, discharging a nonassignable duty, delegated to him by the master or company."

**WHETHER CONDUCTOR AND ENGINEER FELLOW SERVANTS'
ARKANSAS.**

Injury to Conductor—Negligence in Running Train.

The conductor of a train is the fellow servant of its engineer, so as to prevent recovery against the company for injuries sustained by the former through the negligence of the engineer in running the train. So held in *St. L. I. M. & S. Ry. v. Morgart Adm'x*, 45 Ark. 318.

DELAWARE.

Injury to Conductor.

In *Creawell v. Wilmington & N. R. Co. (Del.)*, 14 Am. & Eng. R. Cas., N. S., 625, it is held that engineer and conductor of the same train are fellow servants.

KENTUCKY.

Conductor Injured While Coupling—Backing Cars at Excessive Speed.

An engineer is the fellow servant of the conductor of his train; and there can be no recovery against the company for the death of the latter, due to the negligence of the engineer in backing the train at a much higher rate of speed than was proper when a coupling was being made by the conductor. So held in *Edmonson v. Kentucky Cent. Ry. Co. (Ky.)*, 49 S. W. 200.

LOUISIANA.

Engineer Killed—Train Run over Unsafe Bridge—Failure of Conductor to Compel Engineer to Slacken Speed.

The conductor of a construction train is not a fellow servant of its engineer, but represents the railroad company, and is a vice principal of the engineer who is obliged to obey his orders; and the company is liable for the death of the engineer if it results from the failure of the conductor to command and compel the engineer to run the train across an insecure bridge at a safe rate of speed. So held in *Van Amburg v. Vicksburg, S. & P. R. Co.*, 37 La. Ann. 650. In this case it is said in the opinion: "The case of *Chicago, M. & St. Paul R. Co. v. Ross*, 112 U. S. 377, has made an inroad on jurisprudence in the right direction, and we have applied the new principal there established at the present term."

MISSOURI.

Conductor Injured—Negligence in Permitting Fireman to Handle Engine.

In *Harper v. Railway Co.*, 47 Mo. 567, it was held that when an engineer placed a fireman in charge of the engine, acting under authority, either express or implied, his act in so doing was the act of the company and the company was liable to the conductor for injuries sustained by reason of the incompetency of the fireman.

OHIO.

Engineer Injured—Negligence of Conductor in Charge of Train.

Where the engineer of a train is placed under the control of its conductor, who directs when the cars are to start, stop, etc., they are not fellow servants; and the company is liable to the engineer for an injury received, caused by the negligence of the conductor, while they are both engaged in their respective employments. So held in *Little Miami R. Co. v. Stevens*, 20 Ohio 415.

TENNESSEE.

Injury to Conductor Having Control of Crew—Engineer's Disobedience of Directions for Running Train.

The conductor is not the fellow servant of the engineer of his train

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who is subject to his orders, but his superior; and the company is not liable for injuries to the conductor, which was the result of the negligence of the engineer in disobeying his directions in regard to running the train, and in moving it without his order. So held in *Ragsdale v. Memphis & C. R. Co.*, 62 Tenn. 426.

TEXAS.

Death of Engineer—Failure of Conductor to Have Other Train Flagged.

In *Culpepper v. International & G. N. Ry. Co.*, 90 Tex. 627, 40 S. W. 386, it appeared that an engineer, whose train was stopped on the track, was killed by a collision with a following train, caused by the negligence of the conductor of his train in failing to send out brakeman to flag it. The rules of the company provided that "all trains will be run under the directions of conductors, except when their directions conflict with rules or involve risks, in which case the engineer will be held equally responsible." It was held that they were not fellow servants, under the act of 1891 of Texas, providing that servants entrusted with superintendence, etc., are not fellow servants of employees under their control.

WHETHER FELLOW SERVANTS OF FIREMAN.

UNITED STATES.

Fireman Injured in Collision—Failure of Engineer to Obey Rules.

A fireman and engineer of a locomotive, running alone on a railroad track are fellow servants, so that there can be no recovery for injuries sustained by the former through the negligence of the engineer in colliding with a train, because of his failure to obey the rules of the company, with which the fireman was familiar. So held in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368.

Firemen and Engineers in Same Department.

In *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, it is said in the opinion: "The running of an engine by itself is not a separate branch of the service, seems perfectly clear. The fact is, all the locomotive engines of a railroad company are in the one department, the operating department; and those employed in running them, whether as engineers or firemen, are engaged in a common employment, and are fellow servants."

Injury to Fireman While Oiling Turntable—Negligence of Engineer in Starting Turntable.

In *Briegal v. Southern Pac. Co. (C. C. A.)*, 98 Fed. 958, it appeared that a fireman, while oiling a turntable by direction of the engineer of his train, which was a matter within the scope of the engineer's duties, was injured through the negligence of the engineer in starting the turntable. It was held that they were fellow servants, and there could be no recovery against the master.

ALABAMA.

Fireman Injured in Collision—Excessive Speed at Station.

A fireman injured in a collision resulting from the negligence of the engineer of his train in running it into a station too fast is the fellow servant of such engineer. So held in *Bull v. Mobile & M. R. Co.*, 67 Ala. 206.

Fireman Injured—Negligence of Engineer Not Entrusted with Control.

In *Kansas City, F. S. & M. R. Co. v. Becker*, 63 Ark. 477, 39 S. W. 358, it is held that the fireman and engineer on the same engine are fellow servants if neither exercises superintendence or control over the other, under the Arkansas statute, providing that employees engaged in the common service in the same department and working together to a common purpose are fellow servants, if they are of the same grade, neither being entrusted with any superintendence, or control over the other.

Note

CALIFORNIA.

Fireman of Ferryboat Injured—Engineer with Authority to Discharge.

In *Stevens v. San Francisco & N. P. R. Co.*, 100 Cal. 554, 35 Pac. 165, it is held that the fireman and engineer of a ferryboat are fellow servants employed "in the same general business" within the meaning of § 197 of Cal. Civ. Code; and the fact that the engineer employs and discharges fireman under him does not alter their relation as fellow servants.

ILLINOIS.

Fireman Killed in Collision—Failure to See Red Light.

There cannot be a recovery against the railroad company, their common master, for the death of a fireman in a collision resulting from the negligence of the engineer of his train in failing to notice a right light, as they are fellow servants. So held in *Illinois Cent. R. Co. v. Hoeler*, 45 Ill. App. 205.

Fireman Injured—Collision between Sections of Train—Negligence of Engineer of Other Section.

An engineer and a fireman working on different sections of a freight train following each other on the same track are fellow servants; and the common master is not liable for injuries sustained by the fireman in a collision caused by the negligence of the engineer. So held in *Terre Haute & I. R. R. Co. v. Leeper*, 60 Ill. App. 194.

INDIANA.

Permitting Firemen to Handle Engine—Waiver of Rule.

In Ohio, etc., *R. Co. v. Collarn*, 73 Ind. 261, it is held that a railroad company is liable for an injury to one of its employees resulting from the act of the engineer in permitting a fireman to handle an engine, although a rule of the company prohibited their engineers from doing so, but the master mechanic, charged with authority to employ and discharge engineers and firemen, knew that such rule was habitually violated.

MICHIGAN.

Fireman Injured in Derailment—Failure to Obey Signals.

There can be no recovery against the common master for injury to a fireman from the negligence of the engineer of his train, his fellow servant, in failing to obey signals, and thereby causing the train to be derailed. So held in *Henry v. Lake Shore & M. S. Ry. Co.*, 49 Mich. 495, 13 N. W. 832.

MINNESOTA.

Fireman Injured in Collision.

The engineer in charge of a locomotive is not the fellow servant of its fireman, so as to exempt the common master from liability for injuries sustained by the latter in a collision resulting from the engineer's negligence. So held in *Ragsdale v. Northern Pac. R. Co.* (Minn.), 42 Fed. 383.

MISSOURI.

Fireman Injured in Collision—Train Run into Open Switch.

The fireman is the fellow servant of the engineer of his train, so as to prevent recovery against the railroad for injuries sustained in a derailment resulting from the negligence of the engineer in running his train into an open switch. So held in *Grattis v. Kansas City, P. & G. R. Co.*, 153 Mo. 380, 55 S. W. 108.

Inspection of Locomotives.

In *Coontz v. Missouri Pac. R. Co.*, 121 Mo. 652, 26 S. W. 661, it is held that an engineer, when discharging the duty of inspecting locomotives, is performing the work of a vice principal.

MONTANA.

Fireman Injured—Explosion of Engine.

A fireman is the fellow servant of the engineer of his train, and

Note

cannot recover against the common master for injuries resulting from the negligence of the other which results in the explosion of the engine. So held in *Mulligan v. Montana U. R. Co.*, 19 Mont. 135, 47 Pac. 795.

NEW JERSEY.

Fireman Injured—Excessive Speed on Insecure Trestle—Disobedience of Orders.

A fireman is the fellow servant of the engineer of his train; and cannot recover for personal injuries sustained solely through the negligence of the latter in running his train on a trestle incapable of supporting it, in disobedience of orders. So held in *Paulmeir v. Erie R. R. Co.*, 34 N. J. L. 151.

NEW YORK.

Fireman Injured in Collision—Failure of Engineer to Signal.

A railroad company is not liable for injury to a fireman which resulted from the negligence of the engineer of his train, his fellow servant, in failing to signal, and thereby causing a collision. So held in *Raid v. New York Cent. & H. R. R. Co.*, 71 N. Y. Supp. 734.

Fireman Injured—Defective Headlight—Failure to Substitute New Wick.

Where the engineer of a train is required by a rule of the company to see that the headlight is in order, and an injury to a fireman is the result of his failure to substitute a new wick for an old one, there can be no recovery against the company, as such failure was the negligence of the fireman's fellow servant. So held in *Simpson v. Central Vt. R. Co.*, 39 N. Y. Supp. 465.

SOUTH CAROLINA.

Fireman Injured—Collision with Horse.

A railroad company is not liable for injury to a fireman caused by the negligence of the engineer of his train, his fellow servant, in not avoiding a collision with a horse. So held in *Murry v. South Carolina R. R. Co.* (S. Car.), 1 McMullin 385. In this case it is said in the opinion: "The engineer no more represents the company than the plaintiff (the fireman). Each in his several department represents his principal. The regular movement of the train of cars to its destination, is the result of the ordinary performance, by each, of his several duties. If the fireman neglects his part, the engine stands still for want of steam; if the engineer neglects his, every thing runs to riot and disaster. It seems to me, it is, on the part of the several agents, a joint undertaking, where each one stipulates for the performance of his several duties."

TENNESSEE.

Fireman Killed—Explosion of Boiler.

A fireman was killed by the explosion of the boiler while the engine was standing on the track ready to start, and the engineer was negligent in failing to be present thirty minutes before the time of starting, as required by a rule of the company. It was held that such negligence did not entitle plaintiff to recover, as it was that of the brakeman's fellow servant. *Nashville, C. & St. L. Ry. v. Handman* (Tenn.), 13 Lea 423.

TEXAS.

Fireman Injured by Sudden Starting of Engine While under It.

The fireman is the fellow servant of the engineer of his train, so as to prevent recovery for injuries to the former resulting from the negligence of the engineer in starting the train without signals, while the fireman, in obedience to the engineer's orders, was under the engine cleaning out the ash pan. So held in *Gulf, C. & S. F. Ry. Co. v. Blohn*, 73 Tex. 637, 11 S. W. 867.

Note

HANDS ON WORK AND CONSTRUCTION TRAINS.

UNITED STATES.

Injury to Laborer on Work Train in Charge of Roadmaster—Collision—Failure of Engineer to Obey Flagman's Orders.

When a work train is in charge of a roadmaster, who directs its movements, and has control of all persons employed upon it, the engineer and conductor of such train are fellow servants of a laborer thereon, so as to prevent recovery for injuries sustained by the latter in a collision caused by the failure of the conductor and engineer to obey the flagman's orders. So held in *Northern Pac. R. Co. v. Smith* (C. C. A.), 59 Fed. 993.

FLORIDA.

Shoveler on Gravel Train Injured—Engine Placed in Charge of Fireman.

In *Parrish v. Pensacola & A. R. Co.*, 28 Fla. 251, 9 So. 696, it is held that a shoveler on a gravel train and its engineer were fellow-servants, where they were both engaged in hauling and unloading gravel in repairing the roadbed, and in absence of statute, the shoveler could not recover for injuries sustained by him through the negligence of the engineer in putting the handling of his engine into the hands of his fireman, who was either careless or incompetent.

ILLINOIS.

Fellow Servants.

Laborer on Construction Train Injured—Train in Charge of Conductor.

In *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108, it is held that where a laborer on a construction train, at work under the orders of the conductor in charge of such train, is injured in consequence of the moving of the train by the engineer, also in pursuance of the order of the conductor, but without giving the preliminary signal as required by the rules, such laborer cannot recover against the common master for injuries resulting for such carelessness of the engineer, as they are fellow servants.

Shoveler on Construction Train Injured.

In *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108, it is said in the opinion: "If his (a shoveler on a construction train) duties attach him to the train as part of its personal equipment, then his branch of service is not independent, in any such sense as to exempt him from the general rule in regard to coemployees, in case he should be injured through the carelessness of the engineer."

Shoveler on Construction Train Injured in Collision.

A shoveler employed on a construction train is a fellow servant of its engineer, and cannot, therefore, recover against the common master for injuries sustained through the negligence of the other, which caused a collision. So held in *Chicago & A. R. Co. v. McDonald*, 21 Ill. App. 409.

Laborer on Construction Train Injured—Sudden Jerk of Train.

A laborer on a construction train and its engineer are fellow servants, and the former cannot recover for personal injuries sustained through the negligence of the latter in starting the train with a sudden jerk. So held in *Miller v. Ohio & M. Ry. Co.*, 24 Ill. App. 326.

Shoveler on Construction Train Injured in Collision.

A shoveler employed on a construction train is the fellow servant of its engineer, and cannot recover from their common master for an injury sustained through the negligence of the engineer, which caused a collision with a passenger train. So held in *St. Louis & S. Ry. Co. v. Britz*, 72 Ill. 256.

Not, as Matter of Law.

Injury to Hand Unloading Car—Negligence in Suddenly Starting Train.

A hand employed to unload posts from a freight car, cannot be

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held, as matter of law, to be a fellow servant of the engineer of the train, through whose negligence, in suddenly starting the car without warning, he was injured. So held in *Louisville, E. & St. L. R. R. Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. 534.

INDIANA.

Laborer on Construction Train Injured in Derailment.

A laborer employed on a construction train cannot recover against the common master for injuries sustained in a derailment resulting from the negligence of his fellow servant, the engineer of such train. So held in *Evansville & R. R. Co. v. Henderson*, 134 Ind. 636, 33 N. E. 1021.

Hand on Gravel Train Injured—Train Run against Ox.

A hand on a gravel train, employed to load and unload, and who rode back and forth upon the train from the places of loading and unloading, is the fellow servant of the engineer of the train; and there can be no recovery for his death resulting from the latter's negligence in running the train against an ox. So held in *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366.

KANSAS.

Hand on Work Train in Charge of Tools Injured—Attempt to Suddenly Stop Train.

In *Missouri Pac. Ry. Co. v. Haley*, 25 Kan. 35, it is held that a person employed upon a construction train to carry water for the men working with the train and to keep the tools from getting lost is the fellow servant of the engineer, through whose act in suddenly attempting to stop the train he was injured.

MARYLAND.

Laborer on Dump Car Injured—Excessive Speed at Curve.

A laborer riding on a dump car, which is his duty to assist in loading and unloading, and injured by reason of the negligence of the engineer of the train, in running it too fast into a curve, cannot recover against the company, as such negligence was that of his fellow servant. So held in *O'Connell v. Baltimore & Ohio R. R. Co.*, 20 Md. 212.

MISSOURI.

Injury to Laborer on Construction Train.

In *Higgins v. Missouri Pac. R. Co.*, 104 Mo. 413, 16 S. W. 409, it is held that an engineer and laborer on a construction train are fellow servants where they work under the same conductor, derive their authority and compensation from the same source, and are engaged in the same general business, though in a different grade of the common service.

OHIO.

Hand on Gravel Train Injured by Reason of Sudden Movement of Train.

A hand employed to load and unload a gravel train, is, while riding on it from the gravel pit to the place of unloading, the fellow servant of its engineer, he not being under the control or subject to orders of the latter; and there can be no recovery for his death against the company on account of the negligence of the engineer in suddenly starting the car without warning, and thereby causing deceased to be thrown upon the track. So held in *Kumber v. Junction R. Co.*, 33 O. St. 150.

OREGON.

Sectionman Injured through Negligence in Running Train on Defective Bridge—Train in Charge of Roadmaster.

In *Knahtla v. Oregon S., L., etc., R. Co.*, 21 Ore. 136, 27 Pac. 91, it is held that a section hand riding on a work train from one place of his work to another, under charge of the roadmaster, is the fellow

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servant of the engineer of the train, so as to prevent recovery against the railroad company for injuries sustained by him through the negligence of the engineer in running the train upon a defective bridge.

TEXAS.

Injury to Woman Cooking on Work Train.

A woman cooking on a work train, occupying a car, and boarding work hands, is not a fellow servant of the engineer of the train. So held in *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288.

MISCELLANEOUS.

Fellow Servants.

Injury to Foreman of Switching Crew.

The foreman of a switching crew is the fellow servant of the engineer and fireman of the train on which he is riding. So held in *Chicago & R. Co. v. Wise* (Ill.), 69 N. E. 500.

Injury to Switchman.

In *Stafford v. Railroad Co.*, 114 Ill. 244, 2 N. E. 185, it was held that a switchman injured through the negligence of the engineer of his crew was the latter's fellow servant.

Injury to Baggage Man—Derailment.

A baggage man is not as matter of law, the fellow servant of the engineer of his train, through whose negligence the former is injured in a derailment. So held in *Chicago & A. R. Co. v. Swan*, 176 Ill. 425, 52 N. E. 916.

Injury to Blacksmith on Wrecking Train—Collision—Failure of Engineer to Follow Instructions.

A blacksmith on a wrecking train, while riding to the scene of accident for the purpose of making repairs, was the fellow servant of the engineer, who also acted as conductor of the train; and there could be no recovery against the common master for injuries sustained in a collision due to the negligence of the engineer in failing to obey instructions. So held in *Abend v. Terre Haute & I. R. Co.*, 111 Ill. 202.

Engine Hand Injured in Derailment—Failure to Wet Rails—Dual Capacity.

In *Nashville R. Co. v. Elliott Coldw.* (Tenn.), 611, it appeared that the suit was brought by a hand on an engine whose business was to pass wood from the tender to the fireman, to recover for injuries sustained by the former in a derailment. The accident may have happened because the engine was not adapted to run on the particular curve of the road, or because the engineer neglected to wet the rails as he had been in the habit of doing at that point. It was held that in the former case the company would be liable, because the knowledge of the engineer of the defect in the locomotive would be knowledge of the company, but that if the difficulty of passing such point might have been in whole, or in part obviated by wetting the rails, the negligence of the engineer in failing to do so was that of a fellow servant, for which the company would not be liable.

Injury to Switchman of Switch Crew—Negligence in Pushing Cars.

The engineer and a switchman of a switch crew are fellow servants, so as to prevent recovery against the company for injury to the switchman from the negligence of the engineer in pushing cars by means of the engine. So held in *Gulf, C. & S. F. Ry. Co. v. Warner*, 89 Tex. 475, 35 S. W. 364.

COMPANY NOT EXEMPT.

Baggage Master—Negligence in Running Train.

In *Chicago & A. Ry. Co. v. Swan* (Ill.), 12 Am. & Eng. R. Cas., N. S., 674, it is held that a baggage master who had no other duties on the train than the usual duties of such an employee, is not a fellow servant of the engineer of the train, so as to exempt the master from liability for injuries to the former through the negligence of the latter in running the train.

*Hedrick v. Southern Ry. Co***Porter Injured While Coupling Cars under Engineer's Orders—Cars Violently Backed.**

In Cincinnati, etc., *R. Co. v. Palmer*, 98 Ky. 382, 33 S. W. 199, it was held that the rule that where two servants are engaged in the same field of labor, but are not of the same rank, the master is liable for an injury to the subordinate by the gross negligence of the superior, but not for an injury resulting from ordinary negligence, was applicable where the porter of a train, who, as well as the engineer, had duties to perform in the making up of the train, was injured through the negligence of the latter in running the engine against cars he had required the porter to couple.

Injury to Common Laborer Assisting Engineer—Negligence in Starting Engine.

In Louisville, etc., *R. Co. v. Collins*, 2 Duv. (Ky.) 114, it was held that the company was liable for injury sustained by a common laborer, while he was assisting an engineer in righting a locomotive, through the gross negligence of the engineer in starting the locomotive.

Injury to Express Messenger Employed to Act as Brakeman—Trainmen May Be in Different Departments.

In Chamberlain *v. Milwaukee & M. R. R. Co.*, 11 Wis. 238, it appeared that an express company messenger who was entitled to be carried on the freight cars of the defendant company, was employed by the superintendent of the road to act as brakeman for one trip, and, while so employed, was thrown from the train by reason of the negligence of its engineer, and injured. It was held that the action would lie, even if the express messenger was considered to be in defendant's employ, as he was not the fellow servant of the engineer. In this case it is said in the opinion: "The company is held liable, because, in setting a force in motion, to be used for its benefit, it is bound to see to it, that it is employed with proper care and skill. But does not this obviously extend to the different duties in the same department, as well as to those of different departments? The great object of this common law principle is not to protect those in one department as against those in another, but to protect every one from injury by the negligence of another. Now, the court classes all whose duties are connected with the running of the cars as engaged in the same department. Yet, everybody knows that this department requires various duties entirely separate and distinct in their character. So that a servant performing one, can, by no just reasoning be held responsible for the negligence of another. A brakeman has to act in obedience to signals by the engineer, but he has no connection whatever with the performance of the duties of the engineer." A. R. Y.

HEDRICK v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, Nov. 22, 1904.)

[48 S. E. Rep. 830.]

Death of Brakeman—Overhead Bridge—Construction—Evidence—Defendant's Answer.

In an action against a railway company for the death of a brakeman who was struck by an overhead bridge while standing on a moving freight train, a part of defendant's answer, alleging that decedent was killed by coming in contact with an overhead bridge, was admitted in evidence. This allegation was a part of a sentence containing further averments that the bridge was properly constructed, together with proper warnings, which was excluded: *held* not error to refuse to require the whole sentence to be introduced.

Harmless Error.

Where, in an action against a railway company to recover for the

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death of a brakeman who was struck by an overhead bridge while standing on a moving freight train, there was abundant evidence showing that the decedent was killed by a blow on the head through contact with the bridge, the error, if any, in admitting a part of a sentence of defendant's answer alleging that decedent was killed by coming in contact with an overhead bridge was not prejudicial, especially when the court charged that the jury should not consider the same as evidence of negligence on defendant's part.

Death of Brakeman—Overhead Bridge—Telltale—Degree of Care.*

Where, in an action against a railway company for the death of a brakeman killed by coming in contact with an overhead bridge while standing on a moving freight train, the evidence showed that ropes were placed 25 or 30 yards on either side of the bridge for the purpose of notifying brakeman of the approach to the bridge without showing that they were not arranged as such warnings are usually arranged, and were not at a proper distance, and a witness testified that the ropes would sometimes get tangled, an instruction that defendant was negligent unless it was found that the warning ropes were so arranged as to sufficiently warn ordinarily prudent persons was proper, it being for the jury to determine whether the ropes constituted sufficient warning.

Same—Same—Assumption of Risk—Knowledge of Danger—Statute.

The statute of Virginia provides that knowledge of any employee of the defective condition of any machinery, ways, or structures of railroad corporations shall not of itself be a bar to a recovery for his death thereby. A brakeman was killed in Virginia, while standing on a moving freight train, by coming in contact with an overhead bridge: *held*, that the brakeman's mere knowledge of the existence of the bridge would not defeat a recovery for his death, though it was his duty to exercise reasonable care with reference to the situation.

Appeal from Superior Court, Davidson County; O. H. Allen, Judge.

Action by C. F. Hedrick, administrator, against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Glenn, Manly & Hendren and F. H. Busbee, for appellant.
Emery E. Raper, for appellee.

MONTGOMERY, J. The plaintiff brought this action to recover damages for the killing of his intestate through the negligence of the defendant. In the complaint it is alleged that the intestate, a brakeman on a freight train of the defendant, while on a run between Spencer, in North Carolina, and Monroe, in Virginia, was required to be upon the top of the freight cars, and while engaged in his work, at a point about two miles south of the city of Danville, Va., was struck on the head and face by the timbers of a bridge which the defendant negligently maintained across a cut on the roadbed, and was so badly injured and hurt that he died a week thereafter. It

*As to the duty to erect telltales or whipping straps, and to maintain them in safe condition, see foot-note appended to *McGarrity v. New York, etc., R. Co.* (R. I.), 9 R. R. R. 65, 32 Am. & Eng. R. Cas., N. S., 65; monograph appended to *Louisville & N. R. Co. v. Hall* (Ky.), 8 R. R. R. 541, 31 Am. & Eng. R. Cas., N. S., 541.

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was further alleged that the bridge was negligently constructed and maintained, because it was at such a low elevation as to render it dangerous and unsafe for its brakeman to discharge their duties at the point where the bridge crossed the track; that the night on which the intestate was injured was a very dark and rainy one; and that the defendant had negligently failed to take proper precaution to warn their brakeman of approaching danger, when nearing the bridge, by placing lights or other sufficient precautions at the approach to the bridge. There was a further allegation in the complaint that by the laws and statutes of the state of Virginia it is provided that in case of the death of a person caused by the wrongful act, neglect, or default of another the administrator of such person shall have a right of action therefor against the person or corporation whose wrongful act, neglect, or default caused such death. And it was further alleged that by act of the General Assembly of Virginia knowledge of any employee injured by defective ways, appliances, and construction of such corporation shall not of itself be a bar to the recovery of damages for the injury and death caused thereby, and that the personal representative of such employee shall have a right of action therefor. The defendant, in its answer, denied that it had been negligent, and set up as a further defense the plea of contributory negligence on the part of the intestate.

There was evidence on the trial tending to show that the intestate was killed by being struck by the timbers of the bridge, and that the bridge was not high enough so a man standing on a box car could be carried under it in safety; that, if a man was standing on an ordinary box car, the bridge would strike him on the breast, or, if on the highest car, on the stomach, or, on the lowest car, on the head. It was further in evidence that there were warning ropes suspended above the track on each approach to the bridge and 25 or 30 yards off, called "tell-tales." Those ropes were intended to notify brakemen to stoop, and they were suspended at such a distance as to strike the heads of the brakemen as they passed. One witness, who had been in the employment of the defendant, said that those warning ropes could not be trusted, as they sometimes got tangled and "kicked up." The plaintiff in the course of the trial offered in evidence a part of paragraph 1 of the answer, viz., "that while the intestate was acting as flagman of defendant company he was killed, and, defendant is informed and believes, by reason of his head coming in contact with an overhead bridge at some point south of the city of Danville, Virginia." The defendant objected, because the part introduced was only a part of a sentence, and the entire sentence was not offered. The remainder of the sentence, after a comma, was, "but defendant alleges that the bridge was properly constructed across the track, and that before reach-

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ing said bridge on either side, for the purpose of warning the employees of it on the train's approaching the bridge, there is constructed what is known as 'tell-tales,' or ropes properly adjusted. * * * The evidence was received as it was offered, and, we think, properly. It is true that the part of the paragraph offered in evidence was only the half of the paragraph and a half of the sentence, but it was a complete admission that the intestate had been killed, and that his death was caused by contact with the bridge. That part of the sentence not offered in evidence did not in the least retract that admission. It only had reference to whether he was killed through the negligence of the defendant. It was not averred in the latter part of the sentence that the intestate was not killed by being stricken on the head by the timbers of the bridge, but it contained a matter of defense on the part of the defendant against its alleged negligence. The case of *Lewis v. Railroad*, 132 N. C. 382, 43 S. E. 919, is in point. The same point of evidence was raised in *Stewart v. Railroad* (at this term) 48 S. E. 793. In that case the plaintiff offered in evidence a part of the first paragraph of the defendant's answer, viz.: "That the plaintiff's intestate was struck by the engine pulling train 34 at the time alleged; that no one saw him struck, or ever heard him say anything about how he was struck, but the defendant alleges that the said deceased, J. R. Reaves, was upon the track, and that the engineer of train 34 did not see him until he saw him fall." That part of the sentence was objected to by the defendant because the whole paragraph was not offered. The omitted part of the paragraph was separated from the other by a colon, and was in these words: "That the engineer and firemen were keeping a lookout, and in no way upon said occasion was the defendant negligent in its conduct against the said deceased. * * * The objection was sustained in the lower court, and the evidence offered excluded, but this court held that that was error, and said: "It was competent to show the killing of the intestate by the defendant, and also to show its negligence. It was an admission complete in itself, and that plaintiff was not compelled to put in matter of explanation or exculpation on the part of the defendant. The defendant would have that privilege itself. 1 Greenleaf, Ev. (16th Ed.) § 201." In that case the sentence was connected by a colon; in this, by a comma. Marks of punctuation are useful in the construction of sentences, and to give each part its force and meaning; but in the pleadings in a law suit the difference between a colon and a comma will make no difference where the parts of a sentence shows that there is a matter in one clause full and complete in itself, establishing an affirmative fact, and which is not denied in the other clause, but only its consequences attempted to be explained or avoided. But, if the evidence offered had not been com-

petent, it would have been in real fact harmless in this case, for there was an abundance of evidence going to show that the intestate was killed by a blow on the head through contact with the bridge timbers; and his honor told the jury, when he received the evidence, and also in his instruction to them, that they should not consider it as evidence of negligence on the part of the defendant, but only as evidence that the intestate was killed by the bridge.

Exception was made by the defendant to that part of his honor's charge to the jury, in substance, that, if the defendant allowed an overhead bridge to remain across its track so low that the intestate, while standing on top of a car in the place of his duty, was stricken by the timbers of the bridge and killed, the first issue (on the defendant's negligence) should be answered "Yes," unless it should be found that the defendant had warning ropes before the approach to the bridge, "so arranged and at a sufficient distance as to be sufficient protection to warn an ordinarily careful and prudent man in the position of the deceased under the same conditions and circumstances; and if the jury find that the defendant had such 'tell-tales' or warning ropes, they should answer on the first issue 'No.' " The defendant contends that the latter branch of the instruction was not pertinent to the facts, and that the first clause was erroneous. The argument was that the only evidence offered was that the "tell-tales" or ropes were 25 or 30 yards on either side of the bridge, and were for the purpose of notifying brakemen of the approach to the bridge, and that the law presumed that the tell-tales were arranged as such warnings are usually arranged, and that there was no evidence that they were not so arranged, and not at a safe and proper distance. It does not need any citation of authority for the position that under the law the master is compelled to provide a reasonably safe place in which his employee it to do his work, and that the failure to perform this duty is negligence. In this case the defendant permitted its bridge to be over its railroad, not of sufficient height above the track so that a brakeman standing on top of its cars could pass thereunder in safety. The night on which he was hurt was dark and rainy. Surely this was evidence of negligence, unless the nature of the surroundings made it impossible for the defendant company to have erected a higher bridge, and in that event such warnings and signals as might operate to prevent injury should have been adopted and put in use. *Am. & Eng. Enc. (2d Ed.)* vol. 4, p. 936; *Bailey's Master's Liability for Injury to Servant*, p. 41. If it were the fact—which was not proved—that the defendant company could not have built a higher bridge, did they adopt such warnings and signals as would operate to prevent injury to its brakemen? If they intended the "tell-tale" ropes for that purpose, who are better judges of the sufficiency and the reasonableness of those precautions than the jury? Was it

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not for them, upon the evidence, to say whether dangling ropes 25 or 30 yards from the approach to the bridge were of proper distance to give warning? Was it not for them to say whether they were sufficient notice to brakemen, considering the evidence of one of the witnesses, who said that they sometimes got tangled and would "kick up"? Was it not for them to say whether or not "tell-tales" ropes were long enough to strike a brakeman if he should be in a stooping position at his work? We see no error in that instruction.

The plaintiff requested the court to instruct the jury that if they found from the evidence that the defendant allowed a low bridge to remain across its track, so that a brakeman on top of the cars could not, while standing thereon, pass under the bridge in safety, mere knowledge of the existence of the bridge so constructed, if the intestate had such knowledge, would not make him guilty of contributory negligence, and the jury should answer the second issue (as to contributory negligence) "No." The court gave that instruction, except that part of it in these words: "that they should answer the second issue 'No,' " and added that: "It was the duty of the plaintiff's intestate to exercise ordinary care with reference to the danger, the surroundings; the situation; and in considering whether he contributed to his injury the jury can consider the fact that he had been running on this road for three or four months, and as to whether he knew the situation and condition of the bridge, its structure and height. It was his duty to exercise reasonable care with reference to the situation. The more danger, the more careful he should be." We see no error in the instruction as given. The statute, on this subject, of the state of Virginia, set out in the complaint, contains this provision: "Knowledge of any employee of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such corporation, shall not of itself be a bar to recovery for any injury or death caused thereby." So that prayer was framed in accordance with the law of the state of Virginia, where the intestate was killed, and the addition to the instruction asked by the plaintiff was almost in the language of the defendant's third prayer for instruction, and we think, in all and its every part, that it fairly and properly presented that phase of the case to the jury.

His honor gave the defendant's third prayer for instructions to the jury, and declined the other three. We need not discuss them, because they are embraced in our consideration of the plaintiff's prayers. The exceptions of the defendant to the evidence are without merit.

Affirmed.

BENSON v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Rhode Island, Sept. 29, 1904.)

[59 Atl. Rep. 79.]

Servant's Injuries—Railroad Brakeman—Choice of Dangerous Place—Contributory Negligence.

The roof of a freight car reached 18 inches over the end walls, and in the diagonal corners of the roof a space $18\frac{1}{2}$ inches long and $23\frac{1}{2}$ inches wide had been cut out to allow brakemen to go up and down the ladder. A brakeman passing along on top of a train of which such car formed a part, instead of using the running board, ran along near the edge of the roof, and was injured by attempting to jump onto the described car and falling to the ground owing to the opening: *held*, that notwithstanding the fact that such cars were not in common use, there being no emergency requiring him to run near the edge of the roof, instead of on the running board, he could not recover for his injuries.

Tillinghast, J., dissenting.

Action by James H. Benson against the New York, New Haven & Hartford Railroad Company. On petition of defendant for a new trial. Judgment rendered for defendant.

For former opinion, see 49 Atl. 689.

Argued before TILLINGHAST, DOUGLAS, and BLODGETT, JJ.

John W. Hogan and Philip S. Knauer, for plaintiff.

Davis S. Baker and Lewis A. Waterman, for defendant.

BLODGETT, J. Conceding it to be established by a preponderance of evidence that cars of the type of car No. 11,487 were not in common use, it is nevertheless undisputed that the running board on car No. 12,525 was in proper condition, and that, if the plaintiff had used it in passing to car No. 11,487, the accident could not have happened. Indeed, this ground of liability was considered and disposed of when this case was before the court, in 23 R. I., at page 157, 49 Atl. 693; the court saying: "When the plaintiff was advised by his experience of the great diversity existing in the construction of cars, it seems to us of little importance whether he had seen a freight car of just that make or not, though he admits he knew cabooses were made so. Using cars of various construction was a risk incident to his employment."

It is also undisputed that there was no emergency requiring the plaintiff to run near the edge of the roof, instead of upon the running board in the center of it; nor did he so do by the direction of a superior in authority. He voluntarily chose a portion of the surface of the roof which he admits he knew had obstructions at the point whence he leaped, as well as at the point to which he had leaped on the next car, in the form of grab irons at each point, when there was an unobstructed passageway between the cars by means of the running boards; and he alone must bear the lamentable consequences of his act.

The law is well settled that when an employee has his choice of two ways of performing a duty—the one safe, though inconvenient, and the other dangerous—he is bound to select the safe method; and if, in so doing, he elects to pursue the dangerous way, and is in consequence injured, he is guilty of such negligence as will preclude his recovery. Instances of the application of this rule are given by the United States Circuit Court of Appeals for the Eighth Circuit in *Gilbert v. Burlington, C. R. & N. Ry. Co.*, decided March 24, 1904, and reported in 128 Fed. 529, at page 536, as follows: "An employee rides upon the pilot of an engine when there are cars on which he could ride with safety. He is injured through the negligence of the master, of the effect of which he was ignorant, when he would have suffered no harm if either he or the master had not been guilty of want of ordinary care. He cannot recover, because his negligence contributes to the injury which the unknown negligence of the master concurred to cause. A pedestrian is about to cross a railroad. It is his duty to stop and look and listen before he crosses. It is the duty of a railroad company to ring a bell or sound a whistle to warn him of approaching trains. A train comes without whistle or bell, and gives no warning of its approach. The footman walks onto the railroad without stopping or looking along the track to the right or the left, and he is injured. He cannot recover, although he had no knowledge that the train carried no bell or whistle, and that no signal would be given, because his negligence contributed to the injury. A brakeman carelessly jumps onto the brake beam of a moving car, and seizes a handhold not placed upon it to sustain a strain of that character, when there are other handholds for the purpose of enabling men to climb upon the cars, which he ought to have used. He is ignorant that, through the negligence of the master, one of the screws which keeps the handhold he seizes in place does not secure it. He pulls out the screw, falls, and is injured. He cannot recover, because his negligence directly contributes to his injury. Indeed, where the plaintiff knows he is exposing himself to great danger, and his negligence directly contributes to his injury, it is not his want of care with reference to the particular negligence or defect that concurs to injure him, but his general breach of duty toward his master—his failure to exercise due care in view of the knowledge which he has—that is fatal to his recovery. When he knowingly departs from the line of duty, and unnecessarily causes his own injury by putting himself in a place which he knows to be dangerous, it is no excuse for his breach of duty that the place was more dangerous than he supposed it to be, or that he did not know the exact degree of the danger he carelessly incurred. One who voluntarily and unnecessarily exposes himself to a known and great danger, and thereby directly contributes to his injury, cannot

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escape the fatal effect of his contributory negligence because the negligence of the defendant which concurred to produce the injury, and of which he was ignorant, made the danger greater than he supposed it would be. *Railroad Co. v. Jones*, 95 U. S. 439, 440, 442, 443, 24 L. Ed. 506; *Railroad Co. v. Houston*, 95 U. S. 697, 702, 24 L. Ed. 542; *Dawson v. Chicago, R. I. & P. Ry. Co.*, 114 Fed. 870, 52 C. C. A. 286; *Erie R. Co. v. Kane*, 118 Fed. 223, 235, 55 C. C. A. 129, 141; *Kresanowski v. Railroad Co. (C. C.)* 18 Fed. 229." And see *Quirouet v. Alabama Great Southern R. Co.* (1900) 111 Ga. 315, 36 S. E. 599, and cases cited; *Morris v. Duluth, S. S. & A. Ry. Co.*, 108 Fed. 747, 47 C. C. A. 661, and cases cited; *Union Pacific R. Co. v. Estes*, 37 Kan. 715, 16 Pac. 131; *Moore v. Kansas City, Ft. Scott & Memphis R. Co.*, 146 Mo. 572, 48 S. W. 487; *Dandie v. So. Pacific R. Co.*, 42 La. Ann. 686, 7 South. 792; *Taylor v. R. Co.*, 109 N. C. 233, 13 S. E. 736.

The remaining general rules applicable were so fully discussed when the case was before the court in 23 R. I. 147, 49 Atl. 689, *supra*, that further discussion of them becomes unnecessary.

Inasmuch as, upon the plaintiff's own testimony, there can be no recovery, the case will be remanded to the common pleas division, with direction to enter judgment for the defendant.

ILLINOIS CENT. R. CO. v. COUGHLIN.

(Circuit Court of Appeals, Sixth Circuit, October 21, 1904.)

[132 Fed. Rep. 801.]

Master and Servant—Railroads—Duty of inspection.*

A railroad company, which adopts the customary and approved means or tests for the discovery of defects in its appliances, discharges its duty to its employees in that regard, and an injury which occurs to an employee notwithstanding must be accepted as resulting from one of the risks of the occupation.

Same—Injury of Servant—Latent Defect in Appliance.

Where the nut on the bolt which fastened one end of a handhold on a car either came off when an employee took hold of the handhold, or had previously worked off, by reason of which the employee fell and was injured, and on the trial of an action to recover for the injury there was uncontradicted testimony of the inspector that the

*As to the care required of a railroad company, as an employer, in inspecting appliances, see foot-note appended to *McGrath v. Delaware, L. & W. R. Co.* (N. J.), 8 R. R. R. 337, 31 Am. & Eng. R. Cas., N. S., 337; *Randolph v. New York Cent. & H. R. R. Co.* (N. J.), 8 R. R. R. 637, 31 Am. & Eng. R. Cas., N. S., 637; *Roche v. Denver & R. G. R. Co. (Colo.)*, 8 R. R. R. 955, 31 Am. & Eng. R. Cas., N. S., 955; *Southern Pac. Co. v. Winton (Tex.)*, 3 R. R. R. 358, 26 Am. & Eng. R. Cas., N. S., 358; *Budge v. Morgan's L. & T. R. & S. S. Co. (La.)*, 4 R. R. R. 440, 27 Am. & Eng. R. Cas., N. S., 440; *Texas & P. Ry. Co. v. Allen (C. C. A.)*, 4 R. R. R. 37, 27 Am. & Eng. R. Cas., N. S., 37 (cars); monograph, 4 R. R. R. 441, 27 Am. & Eng. R. Cas., N. S., 441 (foreign cars).

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nuts were on and screwed down on the night previous, it was prejudicial error to refuse to qualify an instruction that the defendant company would not be liable if the handhold pulled loose by reason of the nut coming off, and there was nothing to indicate a weakness or defect in the same, and it would not have been ascertained by ordinary care in inspecting the same.

In error to the Circuit Court of the United States for the Western District of Tennessee.

Francis Fentress, Dist. Atty., and C. G. Bond, for plaintiff in error.

Thomas McCorry and James E. Pope, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is an action for personal injury sustained by the defendant in error while in the service of the plaintiff in error as a switchman. There was a jury, and verdict and judgment for the plaintiff below. The plaintiff, while assisting in switching operations in the yard of the company at McComb City, Miss., attempted to climb upon a passing freight car by grasping the iron handhold on the side. One end of this pulled off the bolt which attached it to the car, and the plaintiff was thrown under a wheel. The question upon which the case turned was whether this handhold had been originally properly secured, and, if so, whether in such case the company had exercised due care in keeping same in safe condition for use.

There was evidence tending to show that the safe and usual way of fastening such a handhold was by bolts running through the wood, with a head on one end and a nut on the other, and that it was not safe to attach such a handhold with a lag screw, a screw with a sharp point on one end and a head at the other. There was some conflict in the evidence as to whether this handhold was attached by a bolt or a lag screw, though the great weight of evidence was that it was attached by a bolt. There was evidence that this car had been overhauled and put in complete order about one month before this accident, and that this handhold was then properly and safely attached and in good order. There was also evidence that the car had been inspected the night before, and the handhold found in good condition; the inspector testifying that there was nothing to indicate any defect in the handholds and that he found this handhold fastened at both ends by bolts and nuts screwed on the ends, and that the taps and nuts were on the ends of the bolts and screwed down solid to the handhold. Within about eight hours thereafter, and before the car had been moved out of the yard where the inspection had been made, this handhold became detached at one end; the nut having been either taken off or having worked off of the head of the bolt.

The uncontradicted evidence is that, within a few minutes

after the injury to Coughlin, a careful examination was made, and the nut found to be off. The thread on the bolt did not show wear, and was yet bright. If the nut was in fact on and screwed down solid to the handhold when examined by the company's inspector a few hours before, there is no fact in evidence which tends to explain the accident. Counsel have conjectured that it may have jostled off from the movement of the car around the yard during switching operations, and that there may have been some hidden defect in the threads of the bolt or the nut. In confirmation of this theory there was evidence that a new nut put on at once was found off of this bolt a few hours later, and after the car had traveled but a little more than 50 miles. It has also been conjectured that the nut may have been taken off for some evil purpose, but there is no fact in the record which supports this, other than the difficulty of reconciling the uncontradicted evidence of the inspector with the fact of the coming off of this handhold. It is again conjectured that the inspection was not carefully made, and that the nut must have been off, or in a condition to easily work off, which condition should have been discovered by a proper inspection.

A railroad company is under obligation to use ordinary care in providing its employees with reasonably safe tools and appliances with which to do their work, and under like obligation to keep same in reasonably safe repair, and neither duty can be avoided by imposing it upon some one of its servants. *Felton v. Bullard*, 94 Fed. 781, 37 C. C. A. 1. But this obligation falls far short of a guaranty that such tools, machinery, or appliances are absolutely safe. *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Patton v. T. & P. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361. Nor is a railroad company under the duty of using unusual or extraordinary care in keeping its equipment or tools in repair. The measure of its duty to an employee is that of ordinary care. If it adopts the ordinary, customary, and approved means or tests for the discovery of defects in its appliances, such as are customarily used by prudently conducted companies, it will discharge its duty, and the employee who sustains an injury notwithstanding must bear the loss as one of the risks of the occupation. *Texas & P. Ry. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136.

Neither does the fact that this handhold broke loose from its attachment and caused an injury to the plaintiff carry with it any presumption of negligence against the company. That the company had been guilty of originally furnishing a defective appliance, or of negligence in keeping it in a reasonably safe condition for use, are affirmative facts which it was incumbent on the injured plaintiff to establish. *Texas & P. Ry. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; *Patton v. T. & P. Ry. Co.*, 179 U. S. 658, 663, 21

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Sup. Ct. 275, 45 L. Ed. 361. Neither is it enough for the injured employee to show that the injury may have been the result of the negligence of the employer, or may have been the result of some cause for which the employer was not responsible. The burden of proof being upon him, he must be able to show that the injury was the consequence of the negligence of the employer. As put by the Supreme Court in *Patton v. T. & P. Ry. Co.*, cited above:

"When the testimony leaves the matter uncertain, and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

It devolved upon the plaintiff to show either that this handhold had been improperly and unsafely attached, or that the employer had not exercised due care in keeping it in reasonably safe condition for use.

The first he sought to make out by evidence that the appliance was attached to the side of the car by a lag screw, when it should have been fastened by bolts. The court below expressed the opinion that the lag screw theory had not been established. But, as there was a positive conflict of testimony upon this question, it was at least one for the jury. Upon the second point the case turned upon the care with which this car had been inspected the night before. If the nut worked off of the head of the bolt as a consequence of some defect which could not have been observed or detected by such care in examination and inspection as might be reasonably exercised, having regard to the character and hazards of the business and the custom of other companies, managed with reasonable care and caution, the plaintiff would have no case, and the jury should have been so instructed with explicitness.

Neither would the jury be justified in arbitrarily setting aside the uncontradicted evidence of the inspector that the nuts were on the ends of the bolts the night before, "and screwed down solid to the handholds." If this was true, the nut must have worked off through some defect in the bolt or nut, or been taken off willfully. Unless the testimony of the inspector was impeached in some way known to the law, there was no legal ground for rejecting it, and this the court should have said to the jury. If the nut was upon the bolt when Coughlin grasped the handhold, what was the

defect in either which produced the accident? If the jury find such defect, was it one which should have been discovered by the exercise of that degree of care in inspection which is practiced by a company prudently managed? This question was not put to the jury in any such clear and pointed way as the interest of justice would seem to require. The learned trial judge recognized this to be the turning point of the case, and at one point in his charge said:

"If it was a hidden defect, so concealed in the nature of the structure, if the defect was so concealed and so hidden that an ordinarily prudent and careful man would not observe it when they put it on or when they inspected it, then this railroad company could not be held liable."

There followed the paragraph quoted a long discussion of other matters. At the conclusion of the charge the defendant below requested the following:

"If you find that the handhold pulled loose by reason of the nut coming off, and you find that there was nothing to indicate a weakness or defect in the same, and that it would not have been ascertained by ordinary care and caution in inspecting same, then the defendant would not be liable."

This was the plain law of the case, and covered the very question upon which the case turned, and should have been given as requested. This the court did not do; for it was modified, and given in these words:

"If you find that the handhold pulled loose by reason of the nut coming off, and you find that there was nothing to indicate a weakness or defect in the same, and that it would not have been ascertained by ordinary care and caution in inspecting same, *and that there was an inspection with ordinary care, caution, and skill a few hours before the accident*, then the defendant would not be liable."

The interpolated modification is indicated by italics. The request went to the character of the defect which caused the nut to come off. If it came off as the result of some weakness or defect not discoverable by the exercise of ordinary care, the plaintiff failed to show negligence, irrespective of the question of any inspection at all. As given, the charge was not consistent, and was calculated to mislead and confuse the jury.

That the request had been given in substance in the original charge does not cure the error. There are cases where an inexact statement of the law in one portion of a charge can be regarded as corrected by another and more correct statement. But to make the erroneous statement harmless we must be satisfied that the jury could not have been reasonably misled. A correct statement of the law upon the precise point was so vital to a proper determination of the real issue in the case that we feel we cannot pass this matter as harmless. We do not find it necessary to pass upon any of the other matters assigned as error, and content

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ourselves with indicating the general line upon which we think the trial of this case should proceed, having agreed upon a reversal on account of the seventh assignment of error only; same being the assignment of error for refusal to give the request above referred to.

Judgment reversed.

MEEHAN *v.* HOLYOKE ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Hampden, Oct. 18, 1904.)

[72 N. E. Rep. 61.]

Injury to Electric Lineman—Recoil of Cable—Duty to Instruct Servants.*

Plaintiff, a lineman in defendant's employ, was injured by being thrown from a pole by the recoil of a cable while lifting it from one insulator pin to another. In order to do the work, plaintiff stood on a tower wagon underneath the arm of the pole on which the cable rested, with one foot on a brace supporting the arm, and the other foot on the rail attached to, but some two feet higher than, the platform of the tower wagon. The cable at that point was being strung on a sharp turn, and there was nothing to prevent plaintiff from releasing his grasp on the cable as it recoiled: *held*, that since the danger under such circumstances was open and obvious, defendant was not guilty of negligence in failing to instruct plaintiff with reference thereto.

Same—Same—Assumption of Risk.†

Where a lineman was substantially familiar with the manner in which a cable was being raised and attached to the arms of posts at the time he was injured, and the method then employed to adjust the cable to the pole did not differ from that previously followed, he assumed the risk of injury from the use of such method.

Same—Same—Expert Testimony.

Where a lineman was thrown from a pole by the recoil of a cable while he was lifting the same from one insulator pin to another, the process employed, being a matter of common observation and knowledge, was not a proper subject of expert testimony.

Exceptions from Superior Court, Hampden County; Lawton, Judge.

Action by Joseph Meehan against the Holyoke Street Railway Company. A verdict was directed in favor of defendant, and plaintiff brings exceptions. Overruled.

R. P. Stapleton and Wm. H. McClintock, for plaintiff.
Brooks & Hamilton, for defendant.

BRALEY, J. The plaintiff rests his right to recover on the ground that the defendant's negligence consisted either from putting him to work in a dangerous place without warn-

*As to the master's duty to warn and instruct servants, see foot-note appended to *McMillan v. Grand Trunk Ry. Co.* (C. C. A.), 12 R. R. R. 712, 35 Am. & Eng. R. Cas., N. S., 712.

†For the general principles involved in the doctrine of assumption of risks by railroad employees, see foot-note appended to *Illinois Terminal R. Co. v. Thompson* (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683.

ing him of the danger to which he was exposed, or in moving the wire by an improper method. We assume, in our decision of the case, there was evidence for the consideration of the jury that Connors was intrusted with and exercised superintendence over the plaintiff at the time of the accident. *Knight v. Overman Wheel Co.*, 174 Mass. 455, 54 N. E. 890. But to find the defendant liable for a failure to give proper instructions the danger must have been such that the plaintiff would be presumed to have been ignorant of it. There were no concealed risks, and whatever danger there was arose from the possibility of falling, while handling the wire, from the place where he was required to work. Neither was he being urged in his work so that it could fairly be claimed that his attention was distracted by such a command, and on which he would have a right to rely as a possible excuse that would relieve him from the imputation of negligence. It appears that when the cable was firmly drawn and ready to be adjusted the order was given to the plaintiff "to help * * * lift the wire over." To do this he knew that it would be necessary for him to stand on the platform of the tower wagon, which was just underneath the arm on which the cable rested, and from this position he then voluntarily placed himself with one foot on the brace which supported the arm on that side of the pole and the other foot on the rail attached to, but two feet higher than, the platform, and while taking hold of the arm with his left hand he grasped the cable with his right hand to help lift it over the inner pin so that it could be set in the groove of the insulator on the outside pin and tied. He also must have known something of its weight and the strain to which it was subjected, for he had helped to place it in position upon the top of the arm; and the fact that at this point of the line, and nearly at a right angle with its former course, there was a sharp turn in the direction in which the cable was to be extended, and which might make it more difficult of attachment to the arm, was a matter of common observation. The physical requirements of his work did not prevent him from releasing his grasp, nor was he required by any order, or from the nature of his employment, to retain it, when by so doing his personal safety might be put in peril. If the cable was sufficiently slackened, it was plainly apparent that its weight would be likely to cause it to fall; and in taking the position assumed by him he could easily have perceived that if, from any cause, the cable was not held securely until fastened to the pin, it would recoil, and, if he then retained his grasp, he might be thrown to the ground. As all these conditions were open and visible, no instructions at this time would have afforded to him any further information as to the nature of the work, or the way in which it was to be performed, and he did not already possess, and the defendant owed no duty to instruct where instructions were unnecessary. *Downey v. Sawyer*, 157 Mass. 418, 32 N. E.

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654; *Stuart v. West End. St. Ry. Co.*, 163 Mass. 391, 393, 40 N. E. 180.

Under the second claim of liability the plaintiff argued that he had a right to have this issue submitted to the jury. If some other way than the simple process finally used to place the cable in position would have been better and more safe, yet the plaintiff had been assisting in putting up the cable for more than two weeks before the accident, and during this time about three miles of wire had been strung, and his testimony discloses that he was substantially familiar with the manner in which it was raised and attached to the arms of the poles, and there is nothing to show that the method employed to adjust it to the arm of this pole differed from that previously followed. The acting superintendent was using a method already in use by the defendant, and with which the plaintiff was familiar; and, if he considered the way in which the work was being done unsafe, he was not obliged to continue in its employment as a lineman, but, if he chose to go on, he accepted that way with whatever risk attached to it. *Goodes v. B. & A. R. R. Co.*, 162 Mass. 287, 288, 38 N. E. 500. Although he also testified he was not told and that he did not know it was dangerous to move the cable from one pin to the other, yet under the circumstances he cannot be excused in the exercise of ordinary care from being chargeable with such knowledge, and must be presumed to have realized and appreciated any danger incidental to the process. *Moulton v. Gage*, 138 Mass. 390; *Lothrop v. Fitchburg R. R. Co.*, 150 Mass. 423, 425, 23 N. E. 227; *Goldthwait v. Haverhill & Groverland St. Ry. Co.*, 160 Mass. 554, 556, 36 N. E. 486; *Sullivan v. Simplex Electrical Co.*, 178 Mass. 35, 59 N. E. 645; *Lodi v. Maloney*, 184 Mass. 240, 68 N. E. 229; *Gavin v. Fall River Automatic Tel. Co.*, 185 Mass. 78, 69 N. E. 1055.

The remaining exception relates to the exclusion of the evidence of a witness called by the plaintiff, who, from his large experience in stringing, moving, and repairing similar wire, was asked to give his opinion of what would be the proper way to move the cable, and whether the method adopted was improper. Even if it is conceded that the witness was qualified to give an opinion, this evidence was excluded properly. Where the issue to be tried involves technical or mechanical knowledge not commonly understood, such evidence is admissible to enable a jury to draw correct inferences, and to form a reliable judgment of the effect of the testimony; but the process of stringing a cable wire on the arms of poles erected for that purpose is so plain and simple that it is well within the scope of common observation and knowledge, and can be intelligently comprehended by a jury without the aid of opinion evidence. *Oliver v. North End St. Ry. Co.*, 170 Mass. 222, 49 N. E. 117; *Flynn v. Boston Electric Light Co.*, 171 Mass. 395, 50 N. E. 937; *Ed-*

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wards v. Worcester, 172 Mass 104, 51 N. E. 447; Spillane v. Fitchburg, 177 Mass. 87, 58 N. E. 176, 83 Am. St. Rep. 262.

As the plaintiff has failed to prove any act of negligence on the part of the defendant, his exceptions must be overruled. So ordered.

DANIEL v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, Nov. 22, 1904.)

[48 S. E. Rep. 816.]

Acts of Agent—Liability of Principal.

The liability of a principal for the acts of its agent can only be shown by proof of previous authority or subsequent ratification, and such authority cannot be proved by the agent's acts or declarations.

Agents—Authority.

An agent has not only the authority expressly given him, but such as is necessarily implied from the nature of his employment.

Same—Same—Cashier in Railroad Office—Arrest of Thief.*

A cashier in the local office of a railroad, whose duties are to collect money for freight, and sell tickets to passengers, and forward the money to the railroad's treasurer, is without authority to cause the arrest of one whom he suspects of having stolen money from the office in which the agent is in charge, and the railroad cannot be held responsible for his wrongful act in making a false arrest and instigating a malicious prosecution on account of such theft.

Acts of Servant—Liability of Master.

A master cannot be held liable for the unauthorized act of a servant on the ground that the servant did the act with the intent to benefit or serve the master.

Motion to Nonsuit.

Upon a motion to nonsuit or a demurrer to evidence the court must take as true not only every fact which there is evidence tending to establish, but also all such fair and reasonable inferences of fact as a jury, in trying the case, might properly draw from the evidence.

Appeal from Superior Court, Pitt County; Justice, Judge.

Action by S. M. Daniel against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action for malicious prosecution and false arrest and imprisonment. The plaintiff was accused and prosecuted by the agent of the defendant at Greenville of stealing money from its office at that place, of which the agent had charge. The testimony necessary to be stated was, in substance, as follows: The plaintiff is a young man, 30 years of age, a native of Pitt county, and now a resident of Goldsboro. On

*As to the liability of a master for the malicious torts of his servants, see foot-note appended to Louisville & N. R. Co. v. Routt (Ky.), 10 R. R. R. 344, 33 Am. & Eng. R. Cas., N. S., 344; foot-note appended to Riser v. Southern Ry. Co. (S. Car.), 10 R. R. R. 244, 33 Am. & Eng. R. Cas., N. S., 244; foot-note appended to Patterson v. Maysville, etc., R. Co. (Ky.), 11 R. R. R. 25, 34 Am. & Eng. R. Cas., N. S., 25 (arrests and prosecutions); foot-note appended to Cordner v. Boston & M. R. R. (N. H.), 11 R. R. R. 21, 34 Am. & Eng. R. Cas., N. S., 21.

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the day of his arrest, but prior thereto, he went to the depot of the defendant company in Greenville to take the train for Goldsboro via Kinston, and, finding the passenger depot closed, he went to the freight depot, inquired about his train, and was invited into the office by Atkinson, the agent of defendant. Plaintiff went behind the rail and sat by the stove. Three or four people came in, and then went out. Atkinson was counting money and putting it in a package. He got another man to count it, and he put it in an envelope, and then put it in a drawer, locked the drawer, and went to supper. Plaintiff went out behind him in about three minutes, leaving several white people and one colored man in the office. Defendant's train was late, and when it came the plaintiff boarded it and went to Kinston, where he missed connection with the Atlantic & North Carolina train, and was forced to spend the night at Kinston. During the night a call came from the depot at Greenville for the depot at Kinston by phone—agent at Greenville calling agent at Kinston—connection was made, and immediately after this the agent of defendant at Kinston went to the hotel, called for a policeman, and told him he had orders to arrest Daniel; and then, with the policeman, the agent went to his room at the hotel, and demanded admission; and on being admitted to the room the agent of defendant company directed his search, and also his arrest until the agent at Greenville could be communicated with; the agent at Kinston stated that the arrest was for larceny of money from the company in Greenville. No warrant was sworn out for the arrest, and all was done by agents of defendant company, and the policeman at their instance. The agent at Greenville came downtown, saw the chief of police at Greenville, and asked him to go to the phone office with him. They went to the phone office, and the agent—Atkinson—called for the policeman in Kinston, and at his request the Greenville policeman did the talking. Atkinson was notified that, no warrant being at that time sworn out for plaintiff's arrest, the policeman declined to order his arrest; but afterwards the chief of police of Greenville, at Atkinson's request, called up the policeman at Kinston over the phone, and requested him to arrest plaintiff, which he did; being assisted by the defendant's agent at Kinston, as above stated. The arrest was made in plaintiff's room in the hotel late at night, after he had retired, and he was subjected to the most thorough search and also his room; Meacham, the defendant's agent at Kinston, and several policemen being present and taking part in the search. Plaintiff was taken through the hotel office, and down the public street to the guardhouse, where he was detained a half or three-quarters of an hour. No evidence of plaintiff's guilt being discovered, he was released, after a policeman had communicated with the agent at Greenville, and had been told to let him go. On Sunday morning, following the arrest and search, the

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agent at Greenville applied to the mayor of Greenville, who was local counsel for defendant company, for a warrant for the plaintiff, charging him with the larceny of defendant company's money from the possession of the agent. The warrant was issued, and plaintiff arrested under it on his return to Greenville next day. This was done after he had once been arrested and searched by direction of agent at Greenville, and, at his direction, released. On application the case was removed for trial to another justice. At the trial, delay was caused by the failure of the agent to appear. He was afterwards seen coming out of the office of the local attorney of defendant company, and soon appeared at the trial. After hearing all the evidence, the justice dismissed the warrant, finding no probable cause. Atkinson, at whose instance and request plaintiff was arrested at Kinston, and afterwards in Greenville, was cashier in the defendant's office in the latter place. His duties were to collect money for freight, give receipts therefor, sell tickets to passengers, take care of the money received by him, and forward the same to the treasurer of the defendant company at Wilmington. Plaintiff testified that he did not take the money or voucher. Money to the amount of \$132.45 and a railroad voucher for \$37.50 were stolen from the cash drawer in the railroad office the night the plaintiff was there. At the close of the testimony for the plaintiff, the defendant moved to dismiss the action under the statute. The motion was granted, and judgment rendered accordingly. Plaintiff excepted and appealed.

Fleming & Moore, for appellant.

Skinner & Whedbee and Pou & Fuller, for appellee.

WALKER, J. (after stating the facts). The foregoing statement of the testimony is sufficient to present the point upon which the case turns, namely, the authority of the agent of the defendant to cause the arrest to be made. We are not concerned so much with the manner in which the arrest of the plaintiff was made, as we are with the question whether the defendant, who was the principal of Atkinson and Meacham, is to be charged with liability for their tortious acts. That their conduct towards the plaintiff was inexcusable, if not criminal, and justly provokes the resentment of every good and law-abiding citizen against them, may be freely admitted. The circumstances under which they pursued this man, without the warrant of the law, even to his bedchamber, and at the silent hour of midnight, arousing him from his peaceful slumbers, invading the sanctity and privacy of his room, which the law surrounded with its protection as much so as if it had been his home or his castle; subjecting him to such indignities as no self-respecting man could submit to, even under compulsion, without feeling that he had been humiliated, if not degraded, by them; marching him through the office of the hotel, and down a public street,

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where any and all might see the infamy and disgrace which they had fastened upon him—all these things, and more, they did, which made their offense against him, if the evidence be true, a very serious one; and to him they, and all who participated in causing his arrest, are responsible before the law, and they must reckon with him if he sees fit to call them to account. But we must not allow any feeling of indignation at the grievous wrongs inflicted upon the plaintiff (which cannot be too severely condemned, if, as we must assume, he is an innocent man) to withdraw our attention from those principles of that same law by which the defendant's rights are guarded. The excesses of *Atkinson* and *Meacham* do not establish the defendant's liability. That can be shown only by proof that the defendant authorized the acts to be done, or that after they were done it ratified them. An agent's authority to bind his principal cannot be shown by the agent's acts or declarations. *Francis v. Edwards*, 77 N. C. 271; *Gilbert v. James*, 86 N. C. 244; *Taylor v. Hunt*, 118 N. C. 168, 24 S. E. 359; *Willis v. Railroad*, 120 N. C. 512, 26 S. E. 784. The authority must first be shown, before the acts done or declarations made in pursuance of the authority can bind the principal, or impose any liability whatever upon him. It is not pretended in this case that there was any express authority, or that there was any ratification of the acts of the alleged agents. The plaintiff's sole contention is that what *Atkinson* did at *Greenville*, and *Meacham* at *Kinston*, was within the line of their duty and the scope of their employment, and therefore they had implied authority from the defendant to do what they did, upon the theory, we suppose, that every authority carries with it, or includes in it, as an incident, all the powers which are necessary, proper, or usual as means to effectuate the purposes for which it was conferred, and that consequently when an agency is created for a specified purpose, or in order to transact particular business, the agent's authority, by implication, embraces the appropriate means and power to accomplish the desired end. He has not only the authority which is expressly given, but such as is necessarily implied from the nature of the employment. *Story on Agency* (9th Ed.) § 97. This is the general rule, and the doctrine of *respondeat superior* is a familiar one. But in our opinion, it has no application to the facts of this case. If we should hold that it is so broad in its scope as to include a case like this one, it would lead to most dangerous consequences. For us to say that an agent can by his acts subject his principal to liability in damages to any one injured by his said acts, done when he was not about his master's business, and had no express or implied authority to do them, but was merely seeking to avenge a supposed wrong already committed or to vindicate public justice, would be carrying the doctrine of *respondeat superior* far beyond its acknowledged limits. A servant intrusted with his master's goods

may do what is necessary to preserve and protect them, because his authority to do so is clearly implied by the nature of the service; but when the property has been taken from his custody or stolen, and the crime has already been committed; it cannot be said that a criminal prosecution is necessary for its preservation or protection. This may lead to the punishment of the thief or the trespasser, but it certainly will not restore the property, or tend in any degree to preserve or protect it. It is an act clearly without the scope of the agency, and cannot possibly be brought within the limits of the implied authority of the agent. It would seem that so plain a proposition should need neither argument nor authority to support it, but we are abundantly supplied with both in the cases upon the subject. It is not intended to assert that a principal cannot be held responsible for the willful or malicious acts of the agent, when done within the scope of his authority, but that he is not liable for such acts, unless previously expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority, as when the agent steps aside from the duties assigned to him by the principal to gratify some personal animosity, or to give vent to some private feeling of his own (*McManus v. Crickett*, 1 East, 106), or, as is forcibly stated by Lord Kenyon in the case cited, quoting in part from Lord Holt: "No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him. Now, when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for his acts."

A very able and learned discussion of the question in this case will be found in *Allen v. Ry. Co.*, L. R. 6 Q. B. 65, by Blackburn, J., one of the most eminent of the English judges of his time. The case was apparently well argued on both sides. The judges delivered separate opinions. We quote so much of the leading opinion by Justice Blackburn as will show the full result of the decision: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property. It is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company, which is a corporation, and a private individual. If the law were

that the defendants are responsible for the act of their booking clerk in giving the plaintiff into custody on an unfounded charge, every shopkeeper in London would be answerable for any act done by a shopman left in his shop who chose to accuse a person of having attempted to plunder the shop, every merchant would be responsible for a similar act of his clerk, and every gentleman for the act of his butler or coachman." The case of *Allen v. Ry. Co.* was cited with approval and reviewed at some length in *Carter v. Machine Co.*, 51 Md. 290, 34 Am. Rep. 311 (opinion by Alvey, C. J.), and the doctrine thus summed up: "From these authorities it is quite clear that in a case like the present, where the corporation is sought to be held liable for the wrongful and malicious act of its agent or servant in putting the criminal law in operation against a party upon a charge of having fraudulently embezzled the money and goods of the company, in order to sustain the right to recover it should be made to appear that the agent was expressly authorized to act as he did by the corporation. The doing of such an act could not, in the nature of things, be in the exercise of the ordinary duties of the agent or servant intrusted with the custody of the company's money or goods; and, before the corporation can be made liable for such an act, it must be shown either that there was express precedent authority for doing the act, or that the act has been ratified and adopted by the corporation." That case was cited and followed in several other decisions in the same court to the like effect. *I. B. Imp. Co. v. Steinmeier*, 72 Md. 316, 20 Atl. 188, 8 L. R. A. 846; *R. R. v. Brewer*, 78 Md. 406, 28 Atl. 615, 27 L. R. A. 63; *Kirk v. Garrett*, 84 Md. 385, 35 Atl. 1089; *T. R. Co. v. Greene*, 86 Md. 161, 37 Atl. 642. The following cases presented the same question precisely as we now have under consideration, and were decided in the same way as those already cited: *Stevens v. Ry. Co.*, 10 Exch. 351; *Pressley v. R. R. (C. C.)* 15 Fed. 199; *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *S. E. T. Co. v. Green*, 25 Ill. App. 106; *Croasdale v. Von Boyneburgk*, 206 Pa. 15, 55 Atl. 770; *Hershey v. O'Neill (C. C.)* 36 Fed. 168. In *Dally v. Young*, 3 Ill. App. 38, the plaintiffs in error were sued for malicious prosecution by Young, in that Dally, a subagent of Lathrop, who was agent for the Remington Machine Company, had, at the instigation of Lathrop and the company, prosecuted him criminally for embezzlement of the funds of the company, of which charge he was acquitted. There was no evidence that the prosecution had, previous to its institution, been expressly authorized or afterwards adopted or ratified by Lathrop or the company. The court thus referred to the principle governing the case: "It is true, Lathrop was the general agent of the company at Chicago, and that Dally was a subagent at Bloomington, and subject to his jurisdiction in all matters pertaining to the business of the com-

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pany, but this circumstance of itself would not make him liable for a criminal prosecution commenced by Dally without his knowledge or consent. Where an agent institutes a malicious prosecution of his own head, and without the instigation or direction of his principal, the latter will not be liable for the same, unless he adopts and continues the same with knowledge of all the circumstances." And in *Edwards v. Railway Co.*, L. R. 5 C. P. 446, the court took the same view of the law upon facts substantially similar: "A servant of a railway company has no implied authority, as such, to give a person into custody on a charge of felony. It is the duty of any one who sees a person committing a felony to give him into custody, and it cannot be assumed that Holmes was acting in this matter as the company's servant, and not in accordance with that general duty. If the defendants are held liable here, it will follow that every servant has authority to act in this way for his master, and to render him liable, should he arrest a man wrongfully. It is said that Holmes was in charge of the property which he believed was being stolen, and from that fact it may be inferred that he had authority to act as he did; but the same would apply to a shopman in charge of a shop, or a servant in charge of the house, and yet it has never been suggested that, if such a servant gave a person in charge for felony, the master would be liable." See, also, *Pollock on Torts* (6th Ed.) pp. 89, 90.

The principle we have stated as applicable to the facts in this record, and as established by the authorities cited, has met with the approval of this court in cases closely resembling the one in hand, and in other cases where it was adopted by analogy. Quoting from *Wood on Master & Servant*, 546, the court, in *Willis v. Railroad*, 120 N. C. 512, 26 S. E. 785, says: "In the absence of express orders to do an act, in order to render the master liable the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment. For illustration, a clerk to sell goods suspects that goods have been stolen, and causes an arrest to be made. The master is not liable for the imprisonment or for the assault, because the arrest was an act which the clerk had no authority to do for the master, either express or implied." In a case where the agent of the defendant company had slandered the plaintiff, the court stated the principle as follows: "In a vast majority of the cases the principle is recognized that in some way the company must authorize or approve the tortious act of its agent, and it would be unreasonable to hold the company liable on a bare presumption, in the absence of allegation or any proof of authority or ratification." *Redditt v. Mfg. Co.*, 124 N. C. 100, 32 S. E. 392. Where the defendants had placed a claim against the plaintiff in the hands of their attorney for collection, and the attorney caused the plaintiff to be arrested,

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the court held that the defendants were not liable to the plaintiff in an action for malicious prosecution and false arrest, as the act of their attorney was not within the general course and scope of his employment, and therefore he had no implied authority to do the act, and as the defendants had not expressly authorized the act to be done, or in any way ratified it. *Moore v. Cohen*, 128 N. C. 345, 38 S. E. 919. That case would seem to be decisive of this one, and it is fully sustained by the decision in *Burnap v. Albert*, 4 Fed. Dec. No. 2,170, s. c. *Taney*, 244, in which Chief Justice Taney delivered the opinion. The cases cited in the brief of plaintiff's counsel may, we think, be distinguished from our case. The court was influenced in the decision of them by their peculiar facts, which do not exist in the case at bar. It is not necessary for us to review or comment upon them, except to say that the court thought there was in each of them some evidence tending to show authority from the company for the commission of the wrongful act.

It may then be gathered from the books as a general rule, which is clearly applicable to the facts of this case, that if the servant, instead of doing that which he is employed to do, does something else, which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for what he does. It is not sufficient that the act showed that he did it with the intent to benefit or to serve the master. It must be something done in attempting to do what the master has employed the servant to do. *Mitchell v. Crasweller*, 76 E. C. L. 246; *Limpus v. L. G. O. Co.*, 32 L. J. Exch. 34. Nor does the question of liability depend on the quality of the act, but rather upon the other question—whether it has been performed in the line of duty, and within the scope of the authority conferred by the master. The facts of this case do not bring it within the principle. There is no ground for saying that what was done by the agent was in the ordinary course of the business of the company, nor that it was for its benefit, except in so far as it is for the benefit of all the citizens of the state that a criminal should be prosecuted, convicted, and punished. If the agent acted from a sense of the duty which rests on every one to give in charge a person who he thinks has committed a felony, his conduct, while commendable, would in no way be connected with the defendant so as to fasten liability upon it. *Edwards v. Ry. Co.*, L. R. 5 C. P. 448. In *Croasdale v. Von Boyneburgk*, *supra*, the court says: "The purpose of a criminal prosecution is to punish the offender for violating the laws of the commonwealth, and not to enforce the payment of money, nor, as in civil proceedings, to restore to the owner the property of which he has been defrauded. The criminal process of the court should not be invoked for any such purpose. While the appellant, like any other person, could have instituted the prosecution against Stotsen-

berg, it was clearly not his duty as managing owner to do so." The court, in *Pressley v. Railroad*, supra, states the principle with equal emphasis: "The question is, can such action on his part be held to be within the scope of his agency, and in the course of his employment? There may be, and the books recognize, some difficulty in determining what acts of an agent or employee are properly within the range and course of his employment; but to say that to put the criminal law in operation against a party on a charge of larceny of the property of the corporation is within the scope of his agency and in the course of his employment is a proposition which, in the light of the decided cases, cannot be maintained."

There can be no doubt that the plaintiff has been very ill-used and grievously wronged, as he was most improperly arrested, but unfortunately he has sued an innocent party, instead of suing those who were the real authors and perpetrators of the wrong done to him. We have assumed, of course, that they did the wrong to him, as we are required by an imperative rule, upon a motion to nonsuit or a demurrer to evidence, to take as true not only every fact which there is evidence tending to establish, but also to consider all such fair and reasonable inferences of fact as the jury, if trying the case, might properly have drawn from the evidence. It may be that those parties, if they had been sued, would have been able to show quite a different state of facts from the one with which we have now to deal, and therefore what we have said must be taken as based entirely upon the hypothesis that the facts are correctly given in the testimony introduced by the plaintiff.

Since this opinion was written, we have examined a case recently decided by the Supreme Court of Pennsylvania, in which we find that court reached the same conclusion we have in this case upon facts substantially similar, and supported its decision by cogent reasoning and by the citation of many and weighty authorities. *Markley v. Snow*, 207 Pa. 447, 56 Atl. 999, 64 L. R. A. 685.

Finding no error in the ruling of the court upon these facts, the judgment of nonsuit must stand. No error.

FOSTER v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts, Worcester, Nov. 23, 1904.)

[72 N. E. Rep. 331.]

Employees—Appliances—Presumption.*

It is the duty of one employed by a railroad in the unloading of freight not to expose himself to unusual danger, but he may rely on the presumption that the railroad will not furnish defective appliances for him to use.

Injury to Employee—Contributory Negligence—Failure to See Hole in Car Floor.

A railroad employee unloading freight, who had to pass through a car of another railroad, in which he had not been before, and which was between the car that he was unloading and the freight depot, and whose attention was directed to a rising board over which he had to pass, and which partially concealed a hole in the floor of the strange car, was not guilty of contributory negligence as a matter of law in failing to see the hole and injuring himself by contact therewith.

Same—Railroad's Equipment—Strange Car Used as Passage Way—Employers' Liability Acts.

A freight car of another railroad, made use of by a railroad as a passway between a car of its own, which is being unloaded, and the freight depot, is, as between the railroad and an employee engaged in unloading the car, a part of the railroad's equipment, which it is required to use reasonable precautions to make safe, either at common law or under St. 1887, p. 899, c. 270, § 1, cl. 1, as originally enacted, making employers liable for injuries to employees caused by reason of any defect in the condition of the ways, works, or machinery, etc., or as amended by St. 1893, p. 993, c. 359, which declares that a car in the use of a railroad shall be considered a part of its ways, works, or machinery, whether owned by it or by some other company.

Same—Defective Appliances—Temporary Use.

Where instrumentalities employed by a master are originally defective, or become unsafe for want of repair, the master cannot defend an action for injuries to a servant on the ground of the transitory character of such instrumentalities.

Questions for Jury.

Where the evidence on the questions of negligence and contributory negligence is open to more than one conclusion, its weight and the inferences to be drawn therefrom are for the jury.

**Report from Supreme Judicial Court, Worcester County;
Francis A. Gaskill, Judge.**

**Tort for personal injuries by Edward F. Foster against
the New York, New Haven & Hartford Railroad Company.**

*As to the degree of care required of an employee for his own protection, see foot-note appended to *Central of Georgia Ry. Co. v. McClifford* (Ga.), 11 R. R. R. 457, 34 Am. & Eng. R. Cas., N. S., 457, where the preceding authorities in this series are collected.

For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see foot-note appended to *Illinois Terminal R. Co. v. Thompson* (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683.

Assumption of risks by railroad employees from defective appliances, see foot-note appended to *Carson v. Southern Ry.* (S. Car.), 12 R. R. R. 337, 35 Am. & Eng. R. Cas., N. S., 337, where the preceding authorities in this series are collected.

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In the superior court the jury, by direction, returned a verdict for defendant, and the case was reported for the determination of the Supreme Judicial Court. If the ruling was right, judgment was to be entered on the verdict; otherwise judgment to be entered for plaintiff in the sum of \$1,500. Judgment for plaintiff.

J. E. McConnell and J. H. P. Dyer, for plaintiff.
Arthur P. Rugg, for defendant.

BRALEY, J. It is the contention of the plaintiff that upon the evidence shown by the report whether he was in the exercise of due care or the defendant was negligent were issues of fact upon which the jury could have found in his favor, and therefore the direction of a verdict for the defendant was wrong. In the performance of his duty as delivery clerk the plaintiff was required to unload freight from the cars as called for, and deliver it to consignees, and he had a right to rely on the presumption that the defendant would not furnish defective appliances with which he was to perform the work. The car in which he was injured was not a part of the permanent instrumentalities provided for the reception, delivery, or storage of freight, and he had not been in it until the morning of the accident, and had not previously known of the defective condition of the floor. At that time the car had been opened, and all the usual arrangements made for the delivery of the freight, and the hole in the floor was partly covered by the rising board connecting the cars, and which obstructed a full view of it by the plaintiff. He testified that when he passed through pushing an empty truck before him on his way for the freight his attention was directed to the rising board over which he was to pass, rather than to any other portion of the way, and that he did not see the hole. While it was his duty, in the exercise of ordinary care, not to expose himself to unusual danger, his conduct, under the conditions disclosed, cannot be said as matter of law to have been careless. *Gilman v. Eastern Railroad Corporation*, 10 Allen, 233, 87 Am. Dec. 635; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 134, 22 N. E. 631, 15 Am. St. Rep. 176; *Gustafsen v. Washburn & Moen Mfg. Co.*, 153 Mass. 468, 474, 27 N. E. 179; *Anderson v. Clark*, 155 Mass. 368, 29 N. E. 589; *Bartolomeo v. McKnight*, 178 Mass. 242, 246, 59 N. E. 804. In the conduct of its business the defendant was required, as a carrier of freight, to deliver it to the consignees at the station where the plaintiff was employed, and, if his injuries had been caused by a defective platform provided for his use by the defendant, there would seem to be no sufficient reason why it could not be held liable for such defect. *Snow v. Housatonic Railroad Company*, 8 Allen, 441, 85 Am. Dec. 720. Instead of this, the method generally employed seems to have been that, when a freight

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car was to be unloaded on the second of the two tracks, the "usual, customary, and only way" was to run such car opposite a car on the first track, put a bridge between the two, and then connect the first car with the platform of the freighthouse. The freight was then carried on trucks across the bridge through the intervening car, and over the second bridge to the freighthouse. If it had placed one of its own cars in position for this purpose, there would be no substantial difference between the use of the car or of a movable or stationary platform to accomplish the work, and neither would be an appliance furnished by the defendant. It chose to use a freight car belonging to another railroad company, which had apparently been run over its tracks to this station. Although the report does not show whether the defendant was to be paid for this service, or was merely forwarding the car, or what arrangement, if any, existed between it and the company, it is enough that, whatever the character of the defendant's possession, it took and utilized this car, which at the time of the accident was being used solely for the purpose of unloading its own freight, and, between itself and the plaintiff, must be treated as a part of its works. *Spaulding v. Flynt Granite Co.*, 159 Mass. 587, 588, 34 N. E. 1134. See *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114.

But the plaintiff is not obliged to rely exclusively upon his count at common law, for under the statute it was temporarily a part of the defendant's rolling stock and of its works and machinery. It was being used "as one of the instruments of its business." St. 1887, p. 899, c. 270, § 1, cl. 1. And this would be so, under the circumstances of this case, under the employer's liability act as originally passed or as amended by St. 1893, p. 993, c. 359. *Bowers v. Connecticut River Railroad Co.*, 162 Mass. 312, 317, 38 N. E. 508. For this reason the rule which imposes upon the defendant the duty of properly inspecting cars of other railroad companies delivered to it for transportation, and its consequent liability, whether at common law or under St. 1887, c. 270, § 1, cl. 2, for injury to its servants if this duty is neglected or improperly performed, becomes unimportant in the decision of this case. See *Mackin v. Boston & Albany R. R. Co.*, 135 Mass. 201, 46 Am. Rep. 456; *Coffee v. New York, New Haven & Hartford R. R. Co.*, 155 Mass. 21, 24, 28 N. E. 1128.

There is a class of risks not fully defined that may arise in the ordinary course of employment, and from their transitory character are said not to impair or permanently affect the ways, works, and machinery, and for which the master is not held liable to a servant who may be injured while working under such temporary conditions. *Whittaker v. Bent*, 167 Mass. 588, 46 N. E. 121; *Kanz v. Page*, 168 Mass. 217, 46 N. E. 620; *Thompson v. Norman Paper Co.*, 169 Mass. 416, 417, 48 N. E. 757. See *Northern Pacific Railroad Co. v. Dixon*, 194

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U. S. 338, 346, 24 Sup. Ct. 683, 48 L. Ed. 1006. But where these instrumentalities are originally defective, or become unsafe from want of repair, such a defense is not open. *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375, 377, 52 N. E. 518. If the defendant adapted and used the car as a way or platform over which freight was to be unloaded and transferred to its freight house, or delivered to consignees, then, manifestly, at common law or under the statute, it was required to use every reasonable precaution to see that it was suitable for this purpose; and whether this duty had been discharged was to be determined upon the evidence. *Snow v. Housatonic Railroad Co.*, supra. See *Trimble v. Whitin Machine Works*, 172 Mass. 150, 153, 51 N. E. 463.

As the evidence was open to more than one conclusion on both of the questions presented, its weight and all just inferences to be drawn therefrom were for the jury, and the case should have been submitted to them. In accordance with the terms of the reservation contained in the report, the order must be:

Judgment for the plaintiff in the sum of \$1,500.

MURPHY v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts, Worcester, Nov. 22, 1904.)
[72 N. E. Rep. 330.]

Injury to Employee—Transferring Freight—Section Foreman as Superintendent—Employers' Liability Act.

M., section foreman on defendant railroad, had charge of a gang of men, including plaintiff, whose duty it was, under M.'s instructions, to transfer freight from one car to another, it being M.'s duty to select the cars that were to be unloaded, and check the freight as it was transferred: *held* sufficient to justify a finding that M. was intrusted by defendant with superintendence over the plaintiff, within a statute making a master liable for injuries to a servant by reason of the negligence of a superintendent.

Same—Same—Misplacement of "Brow"—Negligence of Superintendent—Question for Jury.

Plaintiff was injured while transferring freight from one car to another by the misplacement of a "brow" used for that purpose. Defendant's foreman, on seeing one of plaintiff's fellow servants about to reverse the brow, ordered him to let it alone, though the reversal of the brow would have averted the accident: *held* sufficient evidence of defendant's negligence to justify submission of the case to the jury.

Same—Same—Same—Assumption of Risks.*

Where plaintiff was not present at the time a brow used in transfer-

*For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risk by employees, see foot-note appended to *Illinois Terminal R. Co. v. Thompson* (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683.

For the authorities in this series on the subject of the assumption of risks by railroad employees from defective appliances, see foot-note appended to *Carson v. Southern Ry. Co.* (S. Car.), 12 R. R. R. 337, 35 Am. & Eng. R. Cas., N. S., 337.

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ring freight from one car to another was adjusted, and on being called by his foreman, by whose negligence the brow was caused to be improperly placed, went about the work of transferring the freight in the usual way, and was injured by the sliding of the brow as he was taking out his first truck load, plaintiff did not assume the risk of such injury as a matter of law.

~~Same—Same—Same—~~Presumption on Part of Servant.

Where the work of transferring freight from one car to another was being prosecuted under the immediate supervision of the foreman of defendant whose orders plaintiff was bound to obey, plaintiff, when ordered to enter the car with his truck and take a load to a connecting car, had a right to presume that the connecting platform between the two cars had been properly placed.

Exceptions from Superior Court, Worcester County;
Francis A. Gaskill, Judge.

Action by John Murphy against the New York, New Haven & Hartford Railroad Company. From a judgment in favor of defendant, plaintiff brings exceptions. Sustained.

John H. S. Hunt, Edwd. H. O'Brien, and Thayer & Perry,
for plaintiff.

Arthur P. Rugg, for defendant.

BRALEY, J. The plaintiff finally relies on the third count of the declaration to sustain his cause of action, and the questions presented are whether there was any evidence of the defendant's negligence or of the plaintiff's due care which should have been submitted to the jury. It appeared that Mulvaney was the section foreman of the defendant, having charge of a gang of five men, including the plaintiff, whose duty it was under his instructions to unload or transfer freight from one car to another, while he selected the cars that were to be unloaded, and checked the freight as it was transferred. This was sufficient evidence for the consideration of the jury that he was intrusted by the defendant with superintendence over the plaintiff within the meaning of the statute, and for whose negligence it would be responsible. *Mahoney v. New York & New England Railroad Co.*, 160 Mass. 573, 36 N. E. 588.

In the performance of this work by the men a movable platform, called a "brow," was placed between and formed a bridge from one car to the other, over which the freight was wheeled in trucks. The brow in use at the time of the accident was provided with curved hooks at one end, with a cleat on the under edge. These hooks were intended to stick into the floor of the car, thus preventing the brow from slipping, while the opposite end ran to a beveled edge. There was evidence that the usual way of using it was to place the end with hooks on the car to which the freight was to be wheeled, otherwise the loaded truck striking against the raised end as it rested on the hooks might cause it to slide from the car. When the brow used by the plaintiff had been placed in position after the cars had been designated by Mulvaney, the raised end rested on the car to be unloaded, but before any

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work had been done, one of the men, discovering its situation, was about to reverse it, when Mulvaney said "the brow was all right, let it alone," and because of this order no change was made. The method of doing the work, as well as when it should be done, was to be determined by Mulvaney, and it became his duty, when he ordered the plaintiff, with the other men, to go to work unloading freight, to use reasonable care to prevent his being exposed to the danger that the brow might slip from the car when struck by the loaded truck as it rose from the level of the floor of the car to the top of the brow. It could have been found that reversing the brow would have placed it properly, and prevented it from slipping from this cause, as the beveled edge would have been substantially on a level with the floor of the car which was being unloaded, and thus the accident would have been averted. If this was not done because of the order, then its dangerous position was due to him, and furnished evidence of his negligence. *Dean v. Smith*, 169 Mass. 569, 48 N. E. 619; *O'Brien v. Look*, 171 Mass. 36, 50 N. E. 458; *Knight v. Overman Wheel Co.*, 174 Mass. 455, 54 N. E. 890. If the accident was caused by the negligence of the superintendent, this was a risk not assumed by the plaintiff under his contract of service. *Davis v. New York, New Haven & Hartford R. R. Co.*, 159 Mass. 532, 536, 34 N. E. 1070; *Murphy v. City Coal Co.*, 172 Mass. 324, 327, 52 N. E. 503. Nor can it be said as matter of law that by using the brow his conduct was such as to show either that he assumed the risk or failed to exercise ordinary care. He was not present when it was adjusted, and on being called went about his work in the usual way, and the accident happened as he was taking out his first load. Moreover, the work was being prosecuted under the supervision of Mulvaney, whose orders he was to obey, and when directed by him to enter the car with his truck, and take a load to the connected car, he had a right to infer that this order would not have been given if the connecting platform was not properly placed. How far these conditions, when coupled with his previous experience, can be held to have affected his conduct, which otherwise might have been found to be careless, was a question of fact. *White v. Nonantum Worsted Co.*, 144 Mass. 276, 277, 11 N. E. 75; *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 158, 29 N. E. 464, 31 Am. St. Rep. 537; *Hennessy v. Boston*, 161 Mass. 502, 503, 37 N. E. 668; *Powers v. Fall River*, 168 Mass. 60, 65, 46 N. E. 408. Both issues, therefore, under proper instructions, should have been left to the determination of the jury.

Exceptions sustained.

LEXINGTON GROCERY CO. *v.* SOUTHERN RY. CO.

(Supreme Court of North Carolina, Nov. 15, 1904.)

[48 S. E. Rep. 801.]

Issues.

Where the issues submitted were sufficient, the refusal to submit those tendered by defendant was not error.

Carriers—Delay—Penalties—Mismarking—Estoppel.

Where four packages were delivered to defendant railroad company for shipment under a single bill of lading, three of which were mismarked, but notwithstanding such fact they were shipped to the place where they were marked, and the package which was correctly marked was not shipped, defendant was estopped to claim, in an action to recover a penalty for its failure to ship the correctly marked package, that the four packages constituted a single shipment, and that the mismarking of the three was a sufficient excuse for not shipping the fourth.

Same—Same—Same—Statutes—Repeal.

Laws 1903, p. 999, c. 590, § 3, provides that it shall be unlawful for any carrier specified to neglect to transport goods received by it, and billed to any place within the state, for a longer period than four days, in the absence of agreement, etc., and provides for the recovery of a penalty by the party aggrieved of \$25 for the first day, and \$5 for each succeeding day, etc. Section 5 provides that all laws in conflict therewith are repealed, and that the act shall take effect from its ratification: *held*, that such act did not repeal Laws 1901, p. 868, c. 634, providing that it shall be unlawful for any railroad company to allow any freight received to remain unshipped for more than five days, unless otherwise agreed, and providing a penalty of \$25 for each day the freight remains unshipped to any person suing for the same, as to an action brought thereunder prior to the taking effect of the act of 1903.

Same—Same—Same—Police Power.*

Laws 1901, c. 634, p. 868, prohibiting delay by carriers in the shipment

*For authorities in this series on the constitutionality of statutes prescribing a penalty to compel common carriers to perform their duties to the public, see note appended to *Smith v. State* (Tenn.), 11 Am. & Eng. R. Cas., N. S., 144 (separate cars for white and colored passengers); *Missouri, etc., Ry. Co. of Texas v. May* (U. S.), 11 R. R. 485, 34 Am. & Eng. R. Cas., N. S., 485 (Texas Johnson Graas Statute); *Adams Express Co. v. State* (Ind.), 9 R. R. 640, 32 Am. & Eng. R. Cas., N. S., 640 (penal statute prohibiting discrimination by express companies); *State v. Pearson* (La.), 8 R. R. 324, 31 Am. & Eng. R. Cas., N. S., 324 (separate cars for white and colored passengers); *Savannah F. & W. R. Co. v. Elder* (Ga.), 7 R. R. 223, 30 Am. & Eng. R. Cas., N. S., 223 (statute of Georgia requiring connecting carrier to trace lost freight); *State v. Chicago, etc., Ry. Co.* (Iowa), 9 R. R. 445, 32 Am. & Eng. R. Cas., N. S., 445 (penal statute requiring trains to come to full stop before crossing intersecting railroads); *Terre Haute & L. Ry. Co. v. Salmon* (Ind.), 9 R. R. 349, 32 Am. & Eng. R. Cas., N. S., 349 (Indiana statute authorizing adjoining owner to fence tracks upon failure of railroad to do so after 30 days' notice, and to recover expenses, including attorneys' fees, from company, is a valid exercise of police power); *Champion v. Ames* (U. S.), 7 R. R. 188, 30 Am. & Eng. R. Cas., N. S., 188 (commerce in lottery tickets); *Central of Georgia Ry. Co. v. Murphey* (Ga.), 6 R. R. 28, 29 Am. & Eng. R. Cas., N. S., 28 (statute requiring initial or any connecting carriers to give information where freight has been lost); *Chicago & E. R. Co. v. Keith* (Ohio), 6 R. R. 204, 29 Am. & Eng. R. Cas., N. S., 204 (constitutionality of § 3342, Rev. St. of Ohio, requiring railroad companies to drain their right of way); *Ft. Worth & D. C. Ry. Co. v. Masterson* (Tex.), 1 R. R. 764, 24 Am. & Eng. R. Cas., N. S., 764 (live stock

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of freight, and providing a penalty for violation thereof, was a proper exercise of the state's police power.

Appeal from Superior Court, Davidson County; O. H. Allen, Judge.

Action by the Lexington Grocery Company against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action to recover the statutory penalty for failure to ship within the time limited by the statute a box of nutmegs, which, with three other separate packages of goods, was delivered to the defendant at Highpoint for shipment on December 12, 1902. The defendant issued one bill of lading, including the four packages. Its material parts are as follows: "Received by the Southern Railway Company at Highpoint Station, December 2, 1902, from Lexington Gro. Co., the property described below, in apparent good order.

* * * Articles: 1 box raisins, weight 25 pounds; 1 box cakes, weight 25 pounds; 1 box nutmegs, weight 3 pounds; 1 pkg. 4 caddies tob., weight 10 pounds. Rel. Recd. in Rain. Consignee: M. E. & S. E. Allen. Destination: Franklinville, N. C. Consignee's address as information only, and not for purpose of delivery." The box of nutmegs was correctly marked to M. E. & S. E. Allen, Franklinville, N. C. The defendant introduced evidence tending to show that the other three packages were erroneously marked to M. E. Allen, Asheboro, N. C., and were shipped to that place. The box of nutmegs was not shipped at all. The issues and answers thereto are as follows: "(1) Did defendant receive

quarantine law); *Crosby v. Pere Marquette R. Co.* (Mich.), 4 R. R. R. 411, 27 Am. & Eng. R. Cas., N. S., 411 (refusal to carry passengers or freight); *Porter v. Charleston & S. Ry. Co.* (S. Car.), 3 R. R. R. 657, 26 Am. & Eng. R. Cas., N. S., 657 (statute providing penalty for failure to pay damages on freight); note, 14 Am. & Eng. R. Cas., N. S., 851 (stopping trains at county seats); *Louisville & N. R. Co. v. Commonwealth* (Ky.), 4 Am. & Eng. R. Cas., N. S., 193; *State v. Southern Ry. Co.* (N. Car.), 11 Am. & Eng. R. Cas., N. S., 228; *New York, N. H. & H. R. Co. v. People* (U. S.), 8 Am. & Eng. R. Cas., N. S., 172 (statute requiring passenger cars to be heated); *Lake Shore & M. S. Ry. Co. v. State* (U. S.), 16 Am. & Eng. R. Cas., N. S., 26 (requiring trains to stop at stations); *Hall v. Norfolk & Western R. Co.* (W. Va.), 8 Am. & Eng. R. Cas., N. S., 632; *Beardsley v. New York, L., E. & W. R. Co.* (N. Y.), 17 Am. & Eng. R. Cas., N. S., 149 (requiring railroad to sell mileage books); *Illinois Cent. R. Co. v. Commonwealth* (Ky.), 22 Am. & Eng. R. Cas., N. S., 356 (prohibiting discrimination in freight charges). See also *Illinois Cent. R. Co. v. Commonwealth* (Ky.), 23 Am. & Eng. R. Cas., N. S., 326; *Baltimore & O. R. Co. v. Kreager* (Ohio), 18 Am. & Eng. R. Cas., N. S., 99 (providing for recovery of attorneys' fees as costs in action for damage by fire); *Lake Shore & M. S. Ry. Co. v. Smith* (U. S.), 14 Am. & Eng. R. Cas., N. S., 511; *Chesapeake & O. R. Co. v. Commonwealth* (Ky.), 14 Am. & Eng. R. Cas., N. S., 508 (separate cars for white and colored passengers); *Kingsbury v. Missouri, etc., Ry. Co.* (Mo.), 19 Am. & Eng. R. Cas., N. S., 719 (statute allowing double damages for injury to stock through failure to fence); *Atchison, T. & S. F. R. Co. v. Mathews* (U. S.), 14 Am. & Eng. R. Cas., N. S., 89

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from plaintiff for shipment the four packages of goods mentioned in complaint? Ans. Yes. (2) Were the four packages of goods delivered by plaintiff to the defendant company at Highpoint properly addressed to M. E. & S. E. Allen, Franklinville, N. C., or any of them, and if any, which ones? Ans. Yes, as to the nutmegs. (3) Did the defendant company fail to ship the said goods, or any of them, from Highpoint, after December 7, 1902? Ans. Three packages December 10, 1902, to Asheboro, nutmegs not shipped. (4) What was the value of the goods at the time of their delivery to the defendant? Ans. \$17.07. (5) What was the value of the goods at the time they were tendered to the plaintiff? Ans. \$7. (6) How much, if any, is plaintiff entitled to recover of defendant as a penalty for failure to ship said goods? Ans. \$320." The parties contended that the first, third, and fifth issues should be answered by his honor, and that the sixth issue should also be answered by him, as a matter of law, upon the findings of the jury on the second and fourth issues. The defendant tendered issues which were refused by the court.

Glenn, Manly & Hendren, F. H. Busbee, and A. B. Andrews, Jr., for appellant.

McCrary & Ruark and F. C. Robbins, for appellee.

DOUGLAS, J. (after stating the facts). As the issues submitted appear to us to have been sufficient, we see no error in the refusal of his honor to submit those tendered by the defendant. The defendant's prayers for instruction were properly refused. The defendant contends that the four packages constituted one shipment, and that the mismarking

(providing for recovery of attorneys' fees in action for damage by fire); *Jolliffe v. Brown* (Wash.), 3 Am. & Eng. R. Cas., N. S., 254 (imposing penalty of double value of stock killed, for failure to give notice); *Gulf, C. & S. F. R. Co. v. Ellis* (U. S.), 6 Am. & Eng. R. Cas., N. S., 752 (providing for payment of attorneys' fees where claims against railroad companies are not promptly paid); *Chesapeake & O. R. Co. v. American Exchange Bank* (Va.), 3 Am. & Eng. R. Cas., N. S., 424 (federal statute requiring live stock to be unloaded and fed); note, 4 Am. & Eng. R. Cas., N. S., 630 (prohibiting the carriage of diseased live stock); note, 14 Am. & Eng. R. Cas., N. S., 851 (requiring the stoppage of trains at county seats); note, 4 Am. & Eng. R. Cas., N. S., 505 (Sunday laws as interference with interstate commerce); *Hennington v. Georgia* (U. S.), 4 Am. & Eng. R. Cas., N. S., 488 (prohibiting the running of freight trains on Sunday); *Crawford v. Southern Ry. Co.* (S. Car.), 19 Am. & Eng. R. Cas., N. S., 17, prohibiting the transportation of diseased cattle through state); *St. Louis S. W. R. Co. v. Carden* (Tex.), 3 Am. & Eng. R. Cas., N. S., 449 (statute providing penalty for delay in delivery of certain kind of freight in conflict with interstate commerce act); *Illinois Central R. Co. v. State* (U. S.), 4 Am. & Eng. R. Cas. 354 (providing for stoppage of trains). See also, *Cleveland, C., C. & St. L. Ry. Co. v. People* (Ill.), 14 Am. & Eng. R. Cas., N. S., 846; *New York, N. H. & H. R. Co. v. People* (U. S.), 8 Am. & Eng. R. Cas., N. S., 172 (requiring passenger cars to be heated); *State v. Intoxicating Liquors* (Me.), 20 Am. & Eng. R. Cas., N. S., 511 (prohibiting the bringing of intoxicating liquors into state).

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of three of them was sufficient excuse for not shipping the fourth. A sufficient answer to this contention is that the defendant shipped to Asheboro the three packages that were wrongly marked, and failed to ship the package that was correctly marked in accordance with the bill of lading. The packages were in fact separate and distinct, and it does not appear that retaining the nutmegs helped or could help the defendant to find the three packages that it had already shipped to Asheboro. The failure to ship that package is without legal excuse, and clearly comes within the letter and spirit of the prohibiting statute.

The defendant again contends that the penalty, if any has been incurred, comes within the provisions of chapter 590, p. 999, of the Laws of 1903, and not under chapter 634, p. 868, of the Laws of 1901.

A brief review of the legislative history of penalties for the nonshipment of freight may serve to illustrate the intent and spirit of the law. They apparently originated with the act of March 22, 1875, being chapter 240, p. 322, of the Laws of 1874-75. Section 1967 of the Code is an exact copy of the second section of the said act, and is as follows: "It shall be unlawful for any railroad company operating in this state to allow any freight they may receive for shipment to remain unshipped for more than five days unless otherwise agreed between the railroad company and the shipper, and any company violating this section shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped to any person suing for the same."

Chapter 520, p. 580, of the Laws of 1891 amended section 1967 of the Code by striking out the penalty of \$25, and providing that the railroad company shall pay "to the party aggrieved double the loss or damage actually sustained by reason of said freight so remaining unshipped."

Chapter 634, p. 868, of the Laws of 1901, repealed chapter 520, p. 580, of the Laws of 1891, and re-enacted section 1967 of the Code; amending it, however, by changing the penalty of \$25 per day to \$5 per day and all actual damages; both penalty and damages being recoverable only by the aggrieved party. The amount of penalty is erroneously printed in the volume of the Laws of 1901 as \$500, instead of \$5, as it is in the original act.

Section 3 of chapter 590, p. 999, of the Laws of 1903, is as follows: "That it shall be unlawful for any railroad company, steamboat company, express company or other transportation company doing business in this state, to omit or neglect to transport any goods or merchandise received by it and billed to or from any place in this state for shipment, for a longer period than four days after the receipt of the same unless otherwise agreed upon between the company and the shipper, or unless the same be burned, stolen or otherwise destroyed, or to allow any such goods or merchandise to re-

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main at any intermediate point more than forty-eight hours, unless otherwise provided for by the corporation commission. Each and every company violating any provision of this section shall forfeit to the party aggrieved the sum of \$25 for the first day and \$5 for each and every day of such unlawful detention thereafter, in case such shipment is made in carload lots, and in less quantities the forfeiture shall be \$12.50 for the first day and \$2.50 for each succeeding day: provided the forfeiture shall not be collected for more than 30 days." Section 5 of said chapter is as follows: "That all laws in conflict herewith are hereby repealed and that this act shall be in force from and after its ratification." This act does not expressly affect pending suits, and it cannot do so by implication.

Section 3764 of the Code, in chapter 59, relating to the repeal and construction of statutes, is as follows: "The repeal of a statute shall not affect any action brought before the repeal for any forfeitures incurred, or for the recovery of any rights accruing under such statute."

The principle governing the application of statutes creating a cause of action where none existed before has been well settled in this state. Of course, where the statute has been repealed, and there has been no assertion or attempted assertion of any right thereunder prior to such repeal, all right of action is necessarily destroyed. This is too well settled to require any citation of authority, and is universally recognized. Where the right has been asserted during the life of the statute—as, for instance, an action instituted to recover a penalty—the plaintiff acquires an inchoate right, subject to be defeated by express legislative action. *Dye v. Ellington*, 126 N. C. 941, 36 S. E. 177. Where the statute is simply repealed, and no allusion is made to pending actions, the inchoate rights therein acquired are not interfered with, but may be prosecuted to a final recovery. Code, § 3764; *Wilmington v. Cronly*, 122 N. C. 388, 30 S. E. 9. Where suit is brought during the life of the statute, and pending at its repeal, without having gone to judgment, the Legislature may by express terms take away the right of action. *Dyer v. Ellington*, supra. When the plaintiff has obtained a judgment for the penalty before the repeal of the statute, he has a vested right therein which cannot be taken away by the Legislature. *Dunham v. Anders*, 128 N. C. 207, 38 S. E. 832.

In *Dyer v. Ellington*, supra, on page 944, 126 N. C., page 178, 36 S. E., quoted with approval in *Dunham v. Anders*, supra, on page 210, 128 N. C., page 833, 38 N. E., this court says: "An informer has no natural right to the penalty, but only such right as is given to him by the strict letter of the statute. It is not such a right as is intended to be protected by the act, but is one created by the act. He has, in a certain sense, an inchoate right when he brings suit; that is,

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the bringing of the suit designates him as the man thereafter exclusively entitled to sue for that particular penalty. But he has no vested right to the penalty until judgment. Until it becomes vested, we think it can be destroyed by the Legislature. * * * If the penalty had been reduced to judgment, or had been given to the party in the nature of liquidated damages, the case would be essentially different."

Cooley, in his work on Constitutional Limitations, says at page 443: "So, as before stated, a penalty given by statute may be taken away by statute at any time before judgment is recovered." But the same distinguished author says at page 443: "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference."

This action was brought on the 10th day of February, 1903, while chapter 590, p. 999, of the laws of 1903, was ratified on the 9th day of March, 1903. It was therefore brought under the act of 1901—the only act then in existence—and was not interfered with by the act of 1903, which makes no reference to pending cases. In fact the act of 1903 does not profess to repeal the act of 1901 in express terms, as it makes no illusion thereto. Its only repealing clause is section 5, providing "that all laws in conflict herewith are hereby repealed." Given their widest possible latitude, these words cannot be construed to interfere with pending cases. The defendant, while professedly approving of the statutory imposition of penalties, which it says was "made for an honest purpose," insists upon such a construction as would defeat any practical purpose. The nature and essential purposes of statutory penalties are ably and elaborately discussed by Justice Rodman, speaking for the court, in *Branch v. Railroad*, 77 N. C. 348, wherein he says on page 349: "The principle is this: 'When private property is devoted to a public use, it is subject to public regulations.' And this is more especially true when the owner has either a legal or a virtual monopoly of the business in which the property is used. This principle has immemorially in England, and in this country from its first settlement, been assumed in acts of the several Legislatures prescribing charges of innkeepers, ferrymen, and other public carriers, public wharfingers, warehousemen, etc. The act of 1798 (Rev. Code, c. 79, § 3) as to ordinaries and innkeepers authorized the county courts to rate their prices for liquor, diet, lodging, provender, etc. The act of 1779 (Rev. Code, c. 101, § 27) regulates in like manner the tolls at public ferries, and the act of 1777 (Rev. Code, c. 71, § 6) the tolls at public mills. The constitutionality of these acts has never been questioned, but they have been always regarded as wise and politic exercises of the police power of the state. There can be no distinction in principle between the power to enact those acts and the one in question in this case. Of course, it cannot affect this case that the defend-

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ant is a corporation. Corporations, like all other persons, are subject to the police power of the state. There is no exemption in this respect in the charter of the company. It was granted great privileges in consideration of the performances of certain duties to the public. It enjoys a virtual monopoly of the carriage of freights within a certain distance on each side of its line across nearly the entire breadth of the state. It enjoys, through the proverbial 'wisdom of the Legislature,' the privilege of having its property exempt from the general burden of taxation. There could not be a clearer case of property devoted for a valuable consideration to a public use, and consequently subject to public regulation. That the regulation in question is within the scope of the police power of the state seems clear to us. A common carrier is bound by the common law to convey goods committed to him for that purpose within a reasonable time, and on failure is liable in damages. The Legislature consider the common-law liability as insufficient to compel the performance of the public duty. It must have thought that the interests of local shippers, for whose interest, principally, the road was built, and against whom the company had a complete monopoly, were being sacrificed by wanton delays of carriage, in order that the company might obtain the carriage from points where there were competing lines by land and water, as from Wilmington or Augusta. It declared, therefore, that the maximum of delay should be five days after a receipt for carriage, and imposed a penalty for every day's delay beyond. *The act does not supersede or alter the duty or liability of the company at common law. The penalty in the case provided for is superadded. The act merely enforces an admitted duty.*" (Italics ours.)

The defendant also lays stress upon the difference between the value of the goods and the amount of the penalty recovered. In the well-known case of McGowan v. Railroad, 95 N. C. 417, known as the "Rice Case," the plaintiff recovered over \$3,000 in penalties for allowing 27 bags of rice to remain unshipped from Mt. Olive to Goldsboro from the 21st day of November, 1884, to the 21st day of March, 1885.

In Carter v. Railroad, 126 N. C. 437, 36 S. E. 14, this court, in discussing the kindred sections of the Code (1964 and 1967), says on page 440, 126 N. C., page 15, 36 S. E.: "The object in providing a penalty is clearly to compel the common carrier to perform its duty to the public—not simply to the abstract public, but to each individual. Penalties are made cumulative, so as to make it under all circumstances, as far as practicable, to the interest of the carrier to perform its duty. Punishment and compensation are essentially different. The one aims merely to repair the injury done; the other, to prevent its recurrence. Compensation should under all circumstances exactly equal the injury, while punishment, to be effective, must exceed the injury, or at

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least be greater than any possible benefit which can accrue to the offender from a violation of the law. Suppose a large number of cattle were offered for shipment. It might be cheaper for the carrier to pay a penalty of \$50 than to go to any extra expense or trouble to obtain the necessary cars."

As we see no error in the trial of the case, the judgment of the court below is affirmed.

INDIANAPOLIS ST. RY. CO. v. TAYLOR.

(Supreme Court of Indiana, Jan. 3, 1905.)

[72 N. E. Rep. 1045.]

Harmless Error.

In an action for injuries the action of the court in overruling a motion of defendant for a peremptory charge to find for him on a paragraph of the complaint charging a willful infliction of the injury, if error, was harmless, it appearing from special findings that the general verdict for plaintiff was not based on that paragraph.

Accident on Street Car Track—Evidence—Remarks of Conductor.

In an action for injuries to one who was run down by a street car, the testimony of a witness who saw the accident as to remarks made by him to the motorman when he stopped the car were inadmissible.

Same—Care Required at Populous Places—Instruction.

In an action for injuries to one run down by a street car, an instruction that greater care in operating cars is required in populous cities and crowded streets than in sparsely settled districts and streets or highways upon which there are few travelers, was erroneous, as invading the province of the jury.

Same—Same—Evidence.*

In an action for injuries to one run down by a street car any evidence tending to show that the place where the accident occurred was in a populous city or crowded street was proper to be considered by the jury in the determination of defendant's negligence.

Appeal from Circuit Court, Hancock County; E. W. Felt, Judge.

Action by Charles E. Taylor against the Indianapolis Street

*As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-note appended to *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91; *Anniston Elec. & Gas Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312; *Forrestal v. Milwaukee Elec. Ry. & Light Co.* (Wis.), 11 R. R. R. 814, 34 Am. & Eng. R. Cas., N. S., 814; *Warner v. St. Louis & M. R. Co.* (Mo.), 11 R. R. R. 809, 34 Am. & Eng. R. Cas., N. S., 809; *North Chicago St. R. Co. v. Johnson* (Ill.), 11 R. R. R. 774, 34 Am. & Eng. R. Cas., N. S., 774; *South Covington & C. St. Ry. Co. v. McHugh* (Ky.), 11 R. R. R. 760, 34 Am. & Eng. R. Cas., N. S., 760; *Haas v. New Orleans Rys. Co.* (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442; *Coessens v. Rapid Ry. Co.* (Mich.), 11 R. R. R. 382, 34 Am. & Eng. R. Cas., N. S., 382; *Jett v. Central Elec. Ry. Co.* (Mo.), 11 R. R. R. 227, 34 Am. & Eng. R. Cas., N. S., 227; *Chicago Union Traction Co. v. Browdy* (Ill.), 10 R. R. R. 68, 33 Am. & Eng. R. Cas., N. S., 68; *Hayden v. Fair Haven & W. R. Co.* (Conn.), 10 R. R. R. 32, 33 Am. & Eng. R. Cas., N. S., 32; *Louisville & N. R. Co. v. Logsdon's Adm'r* (Ky.), 12 R. R. R. 637, 35 Am. & Eng. R. Cas., N. S., 637.

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Railway Company. From a judgment in favor of plaintiff, defendant appeals. Transferred from the Appellate Court under section 1337u, Burns' Ann. St. 1901. Reversed.

F. Winter, Marsh & Cook, and W. H. Latta, for appellant.

W. V. Rooker, for appellee.

JORDAN, J. Action by appellee to recover for personal injuries. The first and second paragraphs of the complaint charge negligence in the operation of the car by which appellee was struck. The third paragraph alleges that the injury was willfully inflicted. The complaint discloses that on the 11th day of November, 1899, appellee was riding a bicycle in the city of Indianapolis, and while attempting to ride across a double line of tracks of appellant's railway on Illinois street he was struck by a car running south thereon, and was seriously injured. The cause was originally tried on change of venue in the Shelby circuit court, wherein appellee recovered a judgment, which subsequently, on an appeal to this court, was reversed on account of error in the trial court's charge to the jury. *Indianapolis St. R. Co. v. Taylor*, 158 Ind. 274, 63 N. E. 456. After the cause was reversed and remanded, it was tried by jury on change of venue in the Hancock circuit court, and a verdict in favor of appellee for \$6,000 was returned. Along with this general verdict the jury returned answers to a series of interrogatories. Over appellant's motion for a new trial, judgment was rendered against it for the amount of damages assessed by the jury. From this judgment it appeals.

Among the alleged errors discussed and relied upon for reversal are the following: (1) Denying a request for the court to instruct the jury to find in appellant's favor on the third paragraph of the complaint; (2) admission of certain evidence; (3) giving certain instructions to the jury. In answer to the objections of counsel for appellee it may be said that the court's rulings on giving and in refusing certain instructions, together with its rulings on other motions and matters which appellant urges for a reversal, have all been properly brought into the record by bills of exceptions. At the close of the evidence appellant unsuccessfully moved the court to give a peremptory charge to the jury to find in its favor on the third paragraph of the complaint. Appellant contends that in overruling the motion the court erred, as there is no evidence whatever to warrant a finding that the injury was willfully inflicted, as charged in said paragraph. It will, however, serve no useful purpose for us to review the evidence in order to determine this question, for such error, if any, was harmless, because the special findings of the jury disclose that the general verdict is not based upon the third paragraph, but is predicated on the paragraphs of the complaint which charge that the injury resulted from

negligence in the operation of the car by which appellee was struck. It is shown by the evidence that the accident in controversy occurred between 8 and 9 o'clock on the night of November 11, 1899. Appellee at the time was riding a bicycle on Vermont street, going east across Illinois street, and in his attempt to cross the latter street he was struck by one of appellant's cars going south thereon on the west track. The west track was used by cars running south, and the east track by cars running north. After appellee was struck he was carried by the fender of the car some distance, until the car stopped in front of Flanner & Buchanan's undertaking establishment on Illinois street, in front of which there was a light burning. James H. Bacon, a witness on behalf of appellee, testified that on the night of the accident he and his wife, about 8:30 o'clock, were walking on Illinois street between Vermont and New York streets. As they were passing along, his attention was attracted by a noise which sounded as though the street car going south at the time had struck something. The witnesses stated that soon after he heard this noise the car in question stopped in front of the above-mentioned undertaking establishment. He testified that he had reached this point by the time the car stopped. When it stopped he stated he saw a man under the car, who proved to be appellee. After the car stopped it appears the motorman alighted therefrom. The witness was asked by appellee's counsel to state to the jury what he (the witness) said at that time to the motorman. In response to this question he testified as follows: "When he [the motorman] got off of the car I says to him, 'You run without any lights; you are running dark.' I says, 'You had better get up there and back the car so we can get this party out.'"

To these remarks the motorman made no reply. This evidence was permitted to go to the jury over the objections and exceptions of appellant. After the evidence had been given, appellant unsuccessfully moved the court to strike it out. Its counsel earnestly contend that in admitting the declaration or remarks in question, and also in denying its motion to strike them out, the court clearly erred. The decision in the appeal of Indianapolis St. R. Co. v. Whittaker, 160 Ind. 125, 66 N. E. 433, is cited and urged in support of their contention. The question, as here presented, is on "all fours" with the one involved in that case, and the decision therein must be accepted as a ruling precedent on the point here involved. Counsel for appellee, however, insist that the evidence was admissible as a part of the *res gestæ*. In the Whittaker Case, *supra*, a witness on behalf of the plaintiff was asked the following question: "Was anything said by you to the conductor while she (meaning plaintiff) was on the ground about them stopping the car, or Mrs. Wittaker falling?" The witness, over the objections of the defendant in that case, was permitted to testify in response to the ques-

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tion as follows: "Yes, I said when she first fell, 'If you had stopped, and let her off, this would not have occurred.'" To this remark the conductor in that case made no reply. The declarant, James H. Bacon, under the facts as shown, was wholly disconnected with the occurrence, as was the witness in the case cited. He was nothing more than a mere bystander or looker-on at the time he made the remarks or declarations in question. This court, in the Whittaker Case, in reviewing the admissibility of the evidence as there involved, said: "Utterances and exclamations of participants, or of persons acting in concert, made immediately before or after or in the execution of an act, which go to illustrate the character and quality of the act, are usually admissible on the ground that they are a part of the *res gestæ*, and provable like any other fact that elucidates the issue. The rule, however, seems to be exclusive that, to render the expression or declaration of another admissible, the party making it must have been so related to the occurrence as to make his declaration a part of it. The test seems to be that, to render the utterance or declaration of another admissible, it must flow from one of the actors, or from one sustaining some relation to the transaction, and be so intimately connected with the litigated act as to be the act speaking of itself through the witness speaking the words of another employed concerning the act. Gillett, Ind. & Col. Ev. § 290; Wilkins v. Ferrell, 10 Tex. Civ. App. 231, 30 S. W. 450; State v. Riley, 42 La. Ann. 995, 8 South. 469; Kaelin v. Commonwealth, 84 Ky. 354, 366, 1 S. W. 594; Senn v. Southern R. Co., 108 Mo. 142, 18 S. W. 1007; Kirkpatrick v. Briggs, 78 Hun, 518, 29 N. Y. Supp. 532. In the last case cited the plaintiff fell through an open trapdoor in the sidewalk. On the trial for negligent injury the plaintiff was permitted to testify that after he was helped out of the hole by the defendant's servant, who had left the trapdoor open, a man came along, and remarked to the defendant's servant, 'That is a very careless way to leave that, young fellow.' Held to constitute reversible error." The fact that the declarations in question were testified to by the person who made them does not present the question in any different light, so far as their admissibility is concerned, than if they had been introduced in evidence through some other person who was present at the time and heard them made. In the case at bar, among the things sharply contested was whether the car which struck and injured appellee was being run at the time of the accident without lights, or, in the language of the witness, was "running dark." What influence or effect the evidence in controversy may have had upon the jury in arriving at their verdict we are unable to say. That in admitting this evidence the trial court clearly erred is beyond controversy.

Appellant, among others, complains of instruction No. 54. By this charge the court informed the jury that "a street

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railway company operating cars is required to use ordinary and reasonable care to avoid injuring persons who are using the highways upon which the cars are being operated. The degree of care and the means to be employed depend upon the conditions existing at the time and place in question." Immediately following, in the same instruction, the court stated to the jury that "greater care is required in populous cities and crowded streets than in sparsely settled districts and streets or highways upon which there are few travelers." One of the principal questions to be determined by the jury was that of negligence on the part of appellant in running the car in question at the time of the accident. This question was one of fact to be determined by the jurors under all of the evidence and circumstances in the case. It is contended, therefore, by counsel for appellant, that the court, in stating to the jury that "greater care is required in populous cities and crowded streets," etc., clearly invaded the province of the jury. They say: "Ordinary care alone was required of the motor-man, and, while we do not dispute the proposition that the jury have a right, in determining what is ordinary care, to take into consideration the number of people living along and using the streets, we do say that the degree of diligence necessary to make ordinary care does not depend upon the density of the population alone. * * * No more than ordinary care is required in either city or country. The court might as well say that greater care is required in Indiana than in Illinois, or in Marion county than in Hancock county." As a general rule, which is fully supported by the decisions in this jurisdiction, where it appears that the trial court, in its charge to the jury, has overstepped the line which separates the law from the facts, such instructions will constitute reversible error, unless it is affirmatively disclosed by the record that the error was harmless. While it is the province or right of the trial court to instruct the jury fully, freely, and pointedly on all matters of law applicable to the case, still the court in doing so is not authorized to usurp or intrench upon the functions of the jury in the determination of matters of fact. This rule is well affirmed by the following authorities, and many others: *Garfield v. State*, 74 Ind. 60; *Finch v. Bergins*, 89 Ind. 360; *Goodwin v. State*, 96 Ind. 550; *Lewis v. Christie*, 99 Ind. 377; *Union Mut. Ins. Co. v. Buchanan*, 100 Ind. 63; *Unruh v. State*, etc., 105 Ind. 117, 4 N. E. 453; *Abbitt v. L. E. & W. R. Co.*, 150 Ind. 498, 50 N. E. 729; *Latshaw v. State*, etc., 156 Ind. 194, 59 N. E. 471; *Fassnacht v. Emsing*, etc., 18 Ind. App. 80, 46 N. E. 45, 47 N. E. 480, 63 Am. St. Rep. 322; *Pennsylvania Co. v. Hunsley*, 23 Ind. App. 37, 54 N. E. 1071. Whether appellant at the time of the accident had exercised the care which the law exacted in the operation of its car was a question of fact to be determined by the jury under all the cir-

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cumstances and evidence in the case applicable to that point. It is true that any evidence tending to show that the place where the accident occurred was in a populous city or crowded street was proper to be considered by the jury, along with all other applicable evidence, in the determination of appellant's alleged negligence. While, as a matter demonstrated by common experience, it may be true that greater care in the operation of street cars is necessary to avoid accidents in populous cities or crowded streets or highways than is necessary in "sparsely settled districts or on streets or highways where there are few travelers," nevertheless such a question, so far as involved in the case at bar, was a matter of fact to be decided by the jury, and not a matter of law to be announced by the court from the bench. This court said in *Goodwin v. State*, supra: "It is proper for the court to direct the minds of the jury to the facts of the case, but it is not proper for it to annex weight and value to them. That is the exclusive province of the jury." Of course, it was within the province of the court to have directed the minds of the jurors to any particular evidence in the case applicable to the question of ordinary care to be considered by them along with all of the other evidence upon the same point in determining whether appellant, at the time of the accident, was exercising such care in the operation of its car; but it was not the right of the court to advise the jurors, as it in effect did, what weight or value they should attach to any such evidence. Whether the instruction in question is impressed with other infirmities we do not decide. That it is bad for the reason stated is manifest.

Other alleged errors are discussed by counsel for appellant, but as these may not necessarily arise in another trial we pass them without consideration.

For the errors pointed out, the judgment is reversed, and the cause remanded, with instructions to the lower court to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

CENTRAL OF GEORGIA RAILWAY COMPANY, Plff. in Err., *v.*
A. O. MURPHEY and J. L. Hunt, Partners, Doing Business as
A. O. Murphey & Hunt.

(Argued December 16, 1904. Decided January 9, 1905.)

[25 Sup. Ct. Rep. 218.]

Commerce—State Regulations—Interstate Freight Shipments.*

The imposition upon the initial or any connecting carrier by Ga. Code 1895, §§ 2317, 2318, as a condition of availing itself of a valid contract of exemption from liability beyond its own line, of the duty of tracing the freight, and informing the shipper, in writing, when, where, and how, and by which carrier, the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established, is, when applied to an interstate shipment, a violation of the commerce clause of the Federal Constitution.

In error to the Supreme Court of the State of Georgia to review a judgment which affirmed a judgment of the Superior Court of Pike County, in that State, in favor of plaintiffs in an action to recover from an initial carrier for the damages to an interstate freight shipment. Reversed and remanded for further proceedings.

See same case below, 116 Ga. 863, 60 L. R. A. 817, 43 S. E. 265.

Statement by MR. JUSTICE PECKHAM:

The plaintiff in error brings this case here to review the judgment of the supreme court of Georgia, affirming a judgment of the trial court, in favor of the defendants in error, for the damages sustained by them on the shipment of certain grapes, as hereinafter more particularly stated. First reported, 113 Ga. 514, 53 L. R. A. 720, 38 S. E. 970, and again, on appeal from judgment on second trial, 116 Ga. 863, 60 L. R. A. 817, 43 S. E. 265.

The trial court gave judgment for the shippers of the grapes, who were plaintiffs below, for the amount of the difference between the market price of the grapes as shipped in good order and the amount they actually received for the same in their damaged condition, being the sum of \$434.55. The action was commenced in the Pike county court, in the state of Georgia, and the petition averred that on July 31, 1897, the petitioner shipped a carload of grapes from Barnesville, Georgia, consigned to Rocco Brothers, Omaha,

*For authorities in this series on the subject of state interference with interstate commerce, see foot-note appended to *Kavanaugh & Co. v. Southern Ry. Co.* (Ga.), 12 R. R. R. 424, 35 Am. & Eng. R. Cas., N. S., 424; *Allen v. Pullman's Palace Car Co.* (U. S.), 11 R. R. R. 640, 34 Am. & Eng. R. Cas., N. S., 640; *New York v. Knight* (U. S.), 11 R. R. R. 592, 34 Am. & Eng. R. Cas., N. S., 592 (tax on cab service furnished by railroad imposed by statute of New York, not an unconstitutional burden on interstate commerce); *Norfolk & W. Ry. Co. v. Sims* (U. S.), 11 R. R. R. 634, 34 Am. & Eng. R. Cas., N. S., 634 (validity of license tax on goods shipped C. O. D., imposed by N. Car. Laws 1901, p. 116, § 52).

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Nebraska, by way of the Central of Georgia Railway Company. The freight was to be conveyed by more than two common carriers, the initial carrier being the Central of Georgia Railway Company, and the freight was shipped under a contract of shipment in which it was provided that the responsibility of each carrier should cease upon delivery to the next "in good order." The grapes were greatly damaged on the route between Barnesville and Omaha, and the damage resulted from the negligence of the common carriers on the route. The petitioners applied to the plaintiff in error, the initial carrier on the route, and reserved it with an application in writing August 20, 1897, in which they requested that the railway company should trace the freight, and inform the petitioners, in writing, when, how, and by which carrier the freight was damaged, and also that the company should furnish the petitioners the names of the parties and their official position, if any, by whom the truth of the facts set forth in the information could be established. The railroad company failed to trace the freight and give the information in writing within the thirty days required by law, wherefore the petitioners averred that the railroad company became indebted to the petitioners to the amount of the damage to the grapes as stated.

The plaintiff in error demurred to the petition, the demurrer was overruled, and it then put in an answer denying many of the allegations of the petition. Upon the trial it appeared that the grapes were shipped from Barnesville, Georgia, to Omaha, Nebraska, and they were "routed" by the shippers over the Central of Georgia, then the Western & Atlantic, then the Nashville, Chattanooga, & St. Louis, then the Louisville & Nashville, and then the Wabash Railroads. The initial carrier, the plaintiff in error, issued to the shippers, A. O. Murphey and Hunt, a bill of lading for the carload of grapes, which showed the routing as above stated, and the bill was signed by Murphey and Hunt, as the contract between the plaintiff in error and themselves. It contained a promise "to carry (the grapes) to said destination, if on its road, or to deliver to another carrier on the route to said destination, subject, in either instance, to the conditions named below, which are agreed to in consideration of the rate named." Omaha, Nebraska, is not on the road of the plaintiff in error. Paragraph 5 of the bill of lading, under which the shipment of grapes was made, reads as follows:

"5. That the responsibility, either as common carrier or warehouseman, of each carrier over whose line the property shipped hereunder shall be transported, shall cease as soon as delivery is made to the next carrier or to the consignee; and the liability of the said lines contracted with is several, and not joint; neither of the said carriers shall be responsible or liable for any act, omission, or negligence of the other carriers over whose lines said property is or is to be transported."

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The grapes were carried under the contract contained in the bill of lading, and arrived at Omaha, in the state of Nebraska, in a damaged condition.

The law under which the action was brought is found in §§ 2317 and 2318 of the Code of Georgia of 1895. Those sections are set forth in full in the margin.†

On the 20th day of August, 1897, the shippers availed themselves of these provisions of the statute, and duly demanded of the plaintiff in error that it should trace the grapes, and inform the shippers, in writing, when, how, and by which carrier the grapes were damaged, and the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established. They also demanded that the information should be furnished within thirty days from the date of the application. The plaintiff in error, although it endeavored so to do, failed to furnish the information within the time mentioned in the statute. It offered to prove on the trial that the car in which the grapes were originally shipped at Barnesville, on the road of the plaintiff in error, reached Atlanta, Georgia, the end of the line of the plaintiff in error, in due time, and that the grapes were then in good order, and the car was promptly delivered to the next connecting line, that is, the Western & Atlantic Railroad, and by that road it was delivered to the Nashville, Chattanooga, & St. Louis Railroad Company, at Nashville, Tennessee, with the grapes in like good order and condition. The evidence was rejected, the court holding that the plaintiff in error had failed to comply with the conditions of the statute, and that it was therefore liable for the amount of the damage sustained by the petitioners on whatsoever road the damage actually occurred.

Messrs. John I. Hall, Henry C. Cunningham, Lloyd Cleveland, and Robert L. Berner for plaintiff in error.

Messrs. William Wallace Lambdin and Hoke Smith for defendants in error.

MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court:

†Sec. 2317. When any freight that has been shipped, to be conveyed by two or more common carriers to its destination, where, under the contract of shipment or by law, the responsibility of each or either shall cease upon the delivery to the next "in good order," has been lost, damaged, or destroyed, it shall be the duty of the initial or any connecting carrier, upon application by the shipper, consignee, or their assigns, within thirty days after application, to trace said freight, and inform said applicant, in writing, when, where, and how, and by which carrier said freight was lost, damaged, or destroyed, and the names of the parties and their official position, if any, by whom the truth of the facts set out in said information can be established.

Sec. 2318. If the carrier to which application is made shall fail to trace said freight and give said information, in writing, within the time prescribed, then said carrier shall be liable for the value of the freight lost, damaged, or destroyed, in the same manner and to the same amount as if said loss, damage, or destruction occurred on its line.

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The supreme court of Georgia has held in this case that the statute applies to shipments of freight destined to points outside, as well as to those inside, the state, and we must accept that construction of the state statute. The question for us to decide is whether the statute, when applied to an interstate shipment of freight, is an interference with, or a regulation of, interstate commerce, and therefore void.

We think the imposition upon the initial or any connecting carrier, of the duty of tracing the freight, and informing the shipper, in writing, when, where, how, and by which carrier the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution. The supreme court of Georgia has held that a carrier has, in that state, the right to make a contract with the shipper to limit its liability, as a carrier, to damage or loss occurring on its own line. *Central R. & Bkg. Co. v. Avant*, 80 Ga. 195, 5 S. E. 78; *Richmond & D. R. Co. v. Shomo*, 90 Ga. 500, 16 S. E. 220.

Whether the state would have the right to prohibit such a contract with regard to interstate commerce need not therefore be considered. It has not done so, but, on the contrary, its highest court has recognized the validity of such a contract. Without the provisions of the statute in question, the plaintiff in error would not be liable to the shippers in this case, if, without negligence, they delivered the consignment in good condition to the succeeding carrier. This they offered to prove was the case. But if this statute be valid, this limitation of liability can only be availed of by the railroad company by complying with its provisions. In other words, before it can avail itself of the exemption from liability beyond its own line, provided for by its valid contract, the initial or any connecting carrier must comply with the terms of the statute, and must, within thirty days after notification, obtain and give to the shipper the information provided for therein. This is certainly a direct burden upon interstate commerce, for it affects most vitally the law in relation to that commerce, and prevents the exemption provided by a legal contract between the parties from taking effect except upon terms which we hold to be a regulation of interstate commerce. It is said that the reason for the passage of such an act lies in the fact that, as a general rule, shippers under such a contract as the one in question are very much inconvenienced in obtaining evidence of the loss or damage, where it occurred on another road than that of the initial carrier. It is contended that, under such contracts, there being great difficulty in identifying the particular carrier upon whose road the loss occurred, it is reasonable to make the initial or other connecting carrier liable therefor, unless such carrier furnish the information provided for in the statute.

²⁷We can readily see that a provision, such as is contained in the statute in question, would be a very convenient one to shippers of freight through different states. And a provision making the initial or any connecting carrier liable in any event for any loss or damage sustained by the shipper, on account of the negligence of any one of the connecting lines, would also be convenient for the shippers; but it would hardly be maintained, when applied to the interstate shipment of freight, that a state statute to that effect would not violate the commerce clause of the Federal Constitution. The provision of this statute, while not quite so onerous, is yet a very plain burden upon interstate commerce. It is also said that it is so much easier for the initial or other connecting carrier to obtain the information provided for in the statute than it is for the shipper, that a statute requiring such information to be obtained, under the penalty of such carrier being liable for the damage sustained, ought to be upheld for that very reason.

Assuming the fact that the carrier might more readily obtain the information than the shipper, we do not think it is material upon the question under consideration. We are not, however, at all clear in regard to the fact. The loss or damage might occur on the line of a connecting carrier, outside the state where the shipment was made (as was the case here), and we do not perceive that the initial carrier has any means of obtaining the information desired, not open to the shipper. The railroad company receiving the freight from the shipper has no means of compelling the servants of any connecting carrier to answer any question in regard to the shipment, or to acknowledge its receipt by such carrier, or to state its condition when received. And when it is known by the servants of the connecting company that the object of such questions is to place in the hands of the shipper information upon which its liability for the loss or damage to the freight is to be based, it would seem plain that the information would not be very readily given, and the initial or other carrier could not compel it. The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the state, with regard to the transportation of articles of commerce; it prevents a valid contract of exemption from taking effect except upon a very onerous condition, and it is not of that class of state legislation which has been held to be rather an aid to than a burden upon such commerce. The statute in question prevents the carrier from availing itself of a valid contract unless such carrier comply with the provisions of the statute by obtaining information which it has no means of compelling another carrier to give, and yet, if the information is not obtained, the carrier is to be held liable for the negligence of another carrier over whose conduct it has no control. This is not a reasonable

regulation in aid of interstate commerce, but a direct and immediate burden upon it.

The case of *Richmond & A. R. Co. v. Patterson Tobacco Co.*, 169 U. S. 311, 42 L. Ed. 759, 18 Sup. Ct. Rep. 335, is not an authority against these views, but, on the contrary, it supports and exemplifies them. The section of the Virginia Code (1295 of 1887) was held not to be a regulation of interstate commerce, because it simply established a rule of evidence ordaining the character of proof by which a carrier might show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line. The statute left the carrier free to make any limitation as to its liability on an interstate shipment, beyond its own line as it might deem proper, provided, only, the evidence of the contract was in writing and signed by the shipper. The provision of the Virginia statute that, although the contract in writing provided for therein was made in fact, yet "if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge," is a materially different provision from the one under consideration. A provision in a statute may be deemed a reasonable one, and not a regulation of interstate commerce, where the statute simply imposes a duty upon the carrier, when the loss has not happened on the carrier's own line, to inform the shipper of that fact within a reasonable time, and this court has said in the above case that such a provision is manifestly within the power of the state to adopt. This is very different from the duty imposed upon the carrier by the statute in question here, which is much more onerous, and imposes a liability unless the detailed information provided for in the statute is obtained and given to the shipper.

The case of *Chicago M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. Rep. 289, holds the same general principle as that involved in the case just cited. To the same effect are the cases referred to in the opinion of Mr. Justice Gray in the Solan Case. It is idle to attempt to comment upon the various cases decided by this court relating to this clause of the Federal Constitution. We are familiar with them, and we are certain that our decision in this case does not run counter to the principles decided in any of those cases. The statute here considered we think plainly imposes a burden upon the carrier of interstate commerce, and is not an aid to it, but, in its direct and immediate effect, it is quite the contrary.

The power to regulate the relative rights and duties of all persons and corporations within the limits of the state cannot extend so far as to thereby regulate interstate commerce. The police power of the state does not give it the right to

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violate any provision of the Federal Constitution. Being of the opinion that the statute in question, when applied to an interstate shipment, is a regulation of interstate commerce, we must hold the statute, so far as it affects such shipments, to be void on that account. The judgment of the Supreme Court of Georgia is reversed and the case remanded for such further proceedings as may be consistent with this opinion. Reversed.

LINCOLN TRACTION CO. v. HELLER.

(Supreme Court of Nebraska, Jan. 18, 1905.)

[102 N. W. Rep. 262.]

Death of Passenger—Proximate Cause—Burden of Proof.*

In an action against a common carrier, on its common-law liability for negligence, to recover damages for an injury causing the death of a passenger, it is error to instruct the jury that "when the plaintiff has shown that the deceased met with an injury while being transported by the defendant, and the plaintiff has sustained damages thereby, then the burden of proof is upon the defendant to prove by a preponderance of the evidence that it was not guilty of negligence, the proximate cause of his death."

Same—Same—Same.

Lincoln Traction Co. v. Webb (No. 13,712) 102 N. W. 258, approved and followed.

(Syllabus by the Court.)

On rehearing. Reversed.

For former opinion, see 100 N. W. 197.

BARNES, J. In this case Lucy A. Heller, as administratrix of the estate of Thomas C. Heller, deceased, recovered a judgment against the Lincoln Traction Company for alleged negligence, which it is claimed caused the death of the intestate. The company prosecuted error, and the judgment was affirmed. See *Lincoln Traction Co. v. Heller*, 100 N. W. 197. A rehearing was ordered, and on the reargument it was strenuously contended that our opinion was wrong, in approving of the fifth instruction given to the jury by the trial court, which reads as follows: "When the plaintiff has shown that the deceased met with an injury while being transported by the defendant, and the plaintiff has sustained

*See foot-note appended to *Magrane v. St. Louis & S. Ry. Co. (Mo.)*, 13 R. R. R. 1, 36 Am. & Eng. R. Cas., N. S., 1; *Allen v. Northern Pac. Ry. Co. (Wash.)*, 12 R. R. R. 838, 35 Am. & Eng. R. Cas., N. S., 838; foot-note appended to *Logan v. Metropolitan St. Ry. Co. (Mo.)*, 12 R. R. R. 753, 35 Am. & Eng. R. Cas., N. S., 753; *Feldschneider v. Chicago, M. & St. P. Ry. Co. (Wis.)*, 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737; *Fitch v. Mason City & C. L. Traction Co. (Iowa)*, 12 R. R. R. 451, 35 Am. & Eng. R. Cas., N. S., 451; foot-note appended to *Indianapolis St. Ry. Co. v. Schmidt (Ind.)*, 12 R. R. R. 439, 35 Am. & Eng. R. Cas., N. S., 439; *Thurston v. Detroit United Ry. Co. (Mich.)*, 12 R. R. R. 434, 35 Am. & Eng. R. Cas., N. S., 434; foot-notes appended to *Cronk v. Wabash R. Co. (Iowa)*, 12 R. R. R. 429, 35 Am. & Eng. R. Cas., N. S., 429.

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damages thereby, then the burden of proof is upon the defendant to prove by a preponderance of the evidence that it was not guilty of negligence, the proximate cause of his death. This is true, unless the plaintiff's own testimony shows negligence upon the part of the deceased contributing to his death, as approximate cause thereof." We have just had a similar question under consideration in No. 13, 712, Lincoln Traction Co. v. Webb, 102 N. W. 258, where we held that a like instruction was erroneous because it placed the burden of proof on the wrong party—its effect being to shift the burden of proof from the plaintiff to defendant—and because it also announced the rule that mere proof of injury, without more, raised the presumption of negligence on the part of the defendant company. We cannot approve of the instruction quoted, for the reasons given in our opinion in the case last above mentioned. We have carefully read the record and instructions in the instant case to see if we could, in reason, adhere to our former opinion, but we are unable to do so. The instruction complained of is at variance with what we think is the true rule in such cases, and is quite inconsistent with the other instructions given by the trial court.

It appears that the deceased arose from his seat in the defendant's car while it was in rapid motion, and, without warning, went to, and fell from, the front platforms of the car to the ground; that he was caught by some part of the car and dragged some distance before it could be stopped; and that he died from the injuries thus received. The negligence charged was improper construction of the car, a violation of certain city ordinances, the want or lack of a conductor, and some other matters, none of which were of such a nature as to raise the presumption of negligence without direct proof of that fact. Therefore the instruction complained of was highly prejudicial to the rights of the defendant company, and falls clearly within the rule announced in Traction Co. v. Webb, *supra*.

Our former opinion is therefore reversed and set aside, and the judgment of the district court is also reversed, and the cause remanded for a new trial.

LINCOLN TRACTION CO. v. WEBB.

(Supreme Court of Nebraska, Jan. 18, 1905.)

[102 N. W. Rep. 258.]

Street Railways—Carriage of Passengers—Degree of Care.*

Street railway companies are common carriers of passengers, and are liable as other common carriers upon common-law principles. They are required to exercise the utmost skill, diligence, and foresight, con-

*See foot-notes appended to *Magrane v. St. Louis & S. Ry. Co. (Mo.)*, 13 R. R. 1, 36 Am. & Eng. R. Cas., N. S., 1.

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sistent with the business in which they are engaged, for the safety of their passengers, and they are liable for the slightest negligence.

Injury to Passenger—Presumption of Negligence.†

In an action for damages for an injury received while being transported by such common carrier, proof of mere injury, without more, does not raise the presumption of negligence sufficient to impose on the company the burden to prove due care on its part.

Same—Burden of Proof.

In such cases the burden is on the plaintiff to prove that he was a passenger, was injured, the extent of his injuries, the accident from which the injury resulted, and circumstances of such a character as to impute negligence.

Same—Same.

But where negligence is proved, or where, from the nature of the accident, which was the proximate cause of the injury, negligence is presumed, the carrier is then required to show that it was in no wise at fault, or that the plaintiff was guilty of some negligent act which contributed to the injury complained of.

Same—Same.

In such a case it is error to instruct the jury, in substance, that it is only necessary for the plaintiff to prove that he was a passenger and was injured, and that the burden of proof is then upon the defendant to show by a preponderance of the evidence that it was not guilty of the negligent act complained of.

Same—Same.

Paragraph 4 of the syllabus to *Lincoln Street Railway Co. v. McClellan*, 74 N. W. 1074, 54 Neb. 672, 69 Am. St. Rep. 736, is disapproved, and the opinion is modified to conform to the rule above stated. (Syllabus by the Court.)

Error to District Court, Lancaster County; Frosts, Judge.

Action by Wilhelmina Webb against the Lincoln Traction Company. Judgment for plaintiff, and defendant brings error. Reversed.

Clark & Allen, for plaintiff in error.

Billingsley & Greene and R. H. Hagelin, for defendant in error.

BARNES, J. In this case the Lincoln Traction Company prosecutes error from a judgment of the district court of Lancaster county in favor of one Wilhelmina Webb, who will hereafter be called the "plaintiff," and the traction company will be called the "defendant."

The principal assignment of error discussed by counsel is that the court erred in giving the sixth paragraph of his instruction to the jury. For a clear understanding of the question presented, it is necessary to state the issues as made by the pleadings. The charging part of the petition is as follows:

"That on or about the 1st day of August, 1903, the plaintiff, at the special instance and request of the defendant company, became and was a passenger on said street railway, to be carried in its cars safely from the Post-Office building, in said city, to Nineteenth and O streets, on said railway, for

†See preceding case and foot-notes.

the sum of five cents; that when the car on which plaintiff was a passenger was between Eighteenth and Nineteenth streets, on O street, in said city, the plaintiff rang the bell to notify the defendant that she desired to leave said car at Nineteenth and O streets, and when the car reached said Nineteenth and O streets it stopped, and the plaintiff started to get off said car, and before plaintiff had time to leave said car, and while standing on the steps of said car, the defendant carelessly and negligently started said car without a bell ring from the car's conductor, and plaintiff, without negligence on her part, was by the negligence and carelessness of the defendant, as above alleged, thrown violently from said car to the hard pavement, and suffered great and permanent injuries. * * *

The answer was a general denial and a plea of contributory negligence, which was denied by the reply. It is also proper to state that the evidence as to whether the car was stopped a sufficient length of time for the plaintiff to alight, or whether she got off from the car carelessly and negligently while the same was in motion, and was thus guilty of contributory negligence, was, to say the least, conflicting. On the issues presented by the pleadings and the evidence, as above stated, the court gave the instruction complained of, which reads as follows:

"(6) The burden of proof is on the plaintiff to prove by a preponderance of the evidence that she received the injuries complained of while being transported by the defendant company at about the time and place alleged, and that by reason thereof the plaintiff has sustained damages. On the other hand, when the plaintiff has shown that she met with an injury, then the burden of proof is upon the defendant to prove by a preponderance of the evidence that it was not guilty of the negligent act complained of in the plaintiff's petition; said act being the proximate cause of the plaintiff's injuries. The burden of proof is also upon the defendant to show that some negligence of the plaintiff contributed to her injuries, as the proximate cause thereof, unless the plaintiff, in making her own case, has shown that some act of hers contributed to said injury."

It will be observed that this instruction placed the burden on the defendant company, after the injury was shown, to prove by a preponderance of the evidence that it was not guilty of the negligent act set forth in the plaintiff's petition. Its effect was to shift the burden of proof on the question of negligence from the plaintiff, who held the affirmative of that issue, to the defendant, as soon as it was shown that she had been injured. At this point it may be said that it is the settled law of this state that street railways are common carriers of passengers for hire, and are liable, as other common carriers, upon common-law principles. They are bound to exercise extraordinary care, and the utmost skill, diligence,

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and human foresight, for the protection of their passengers, and are liable for the slightest negligence, but they are not held to the strict liability of insurers. That is to say, they are not governed by the provisions of section 10,039, Cobbe's Ann. St. 1903, which defines the liability of steam railways, in this state for damages inflicted upon passengers. *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. Rep. 753; *Pray v. Omaha Street Ry. Co.*, 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717; *East Omaha Street Ry. Co. v. Godola*, 50 Neb. 906, 70 N. W. 491; *Lincoln Street Ry. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736; *Omaha Street Ry. Co. v. Boeson* (Neb.) 94 N. W. 619. It follows that, before the plaintiff could recover in this case, it was necessary for her to allege and prove some negligent act of the defendant company which was the proximate cause of the injury complained of. The rule seems to be well settled that the burden of proof never shifts, but remains with the party holding the affirmative. When a party alleges the existence of a fact as the basis of a cause of action or defense, the burden is always upon him to establish it by proof. *Sarpy County v. Rupp* (Neb.) 98 N. W. 1042; *Kay v. Metropolitan Street Ry. Co.*, 163 N. Y. 447, 57 N. E. 751. It was said by the Supreme Judicial Court of Massachusetts in *Central Corporation v. Butler*, 68 Mass. 132: "The burden of proof and the weight of the evidence are two very different things. The former remains on the party affirming the fact in support of his cause of action, and does not change in any aspect of the case. The latter shifts from side to side in the progress of the trial, according to the nature and strength of the proofs offered in support or denial of the main facts to be established." See, also, *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 345, 73 Pac. 164; *Scott v. Wood*, 81 Cal. 403, 22 Pac. 871.

It is true that in some cases loose expressions may be found; that the burden of proof shifts when the fact that is the basis of a presumption of negligence is made to appear. But it is believed that no court has upheld such a ruling when its attention has been challenged thereto. The burden always rests on the party who has the affirmative, and actions for personal injuries against common carriers are no exception to this rule unless they are made so by statute. Again, by this instruction the jury was told, in substance, that "when the plaintiff had shown that she was a passenger, and had met with an injury, the burden of proof was on the defendant to show by a preponderance of the evidence that it was not guilty of the negligent act complained of in her petition." This, in effect, informed the jury that proof of the injury raised a presumption of negligence. The negligent act charged in the petition was the sudden starting of the car while the plaintiff was alighting therefrom, and the

jury was told that the burden of proof was on the defendant to show that the car did not so start. This was clearly wrong. The court must have misapprehended the rule upon which the doctrine of the presumption of negligence rests. This presumption arises, if at all, from the proof made, or conceded facts from which negligence on the part of the defendant may be inferred. We cannot infer that the car suddenly started and threw the plaintiff, from the mere fact that she fell and struck on the back of her head. She might have fallen when attempting to alight, if the car was standing still. And again she might have slipped or stumbled, and for that reason have fallen immediately after alighting from the car. The bases of the presumption in actions against carriers for personal injuries is not the mere fact of the injury, but is the act of the defendant which causes the injury. In *Spellman v. Rapid Transit Ry. Co.*, supra, it appeared that the car in which the plaintiff was riding was derailed. He alleged that he was injured thereby, and there was evidence to support the allegation. It was said: "He alleged that the derailment of the car was through the negligence of the carrier. The law, by presumption, supplied that proof for him." This was enough. The burden was then on the carrier to rebut this proof of negligence by showing that it was produced by causes wholly beyond its control. In that case the fact of derailment was admitted, and was therefore the basis of the presumption of negligence. In the case of *Omaha Street R. Co. v. Boeson*, supra, it was alleged in the petition that the plaintiff was injured by the derailment of the defendant's car. The charge of derailment was denied by the answer, which also contained a plea of contributory negligence, in that defendant was injured by jumping from the rapidly moving train. There was a conflict of evidence on those questions, and the court gave an instruction as follows: "You are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that he was injured while a passenger of the defendant, the extent of his injuries, and the damages occasioned thereby; and the burden of proof is upon the defendant to show by a preponderance of the evidence that such injuries, if any, were received while the plaintiff was a passenger, by being thrown from a car because of the derailment thereof, were without fault on its part, and that they could not have been avoided by the exercise of the highest degree of skill and diligence on the part of the defendant consistent with its business." The judgment of the trial court was reversed, and in the opinion is found the following: "It may be stated as a general proposition that a street railway is a common carrier of passengers for hire; that ordinarily it will be sufficient for one to show that he was a passenger, and that while such passenger he was injured, and the extent of his injuries. It will then devolve upon the company to show that the injury

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occurred without any negligence on its part, and that by the exercise of the highest degree of care it could not have prevented such injuries. It will be found, however, that this doctrine has been laid down in cases where there was a collision, or where a person had been struck or run over by a street car—in short, where the undisputed cause of the injury fairly raised the presumption of negligence. * * *

The plaintiff alleged, as a substantive part of the case, that he was thrown from the car by a derailment that was caused by the negligence of the company; and it would seem that it would be necessary to show at least that he was thrown from the car as alleged in the petition before any presumption of negligence could arise." This rule is sustained by the decisions of the federal courts. See *Frizzell v. Omaha Street Ry. Co.*, 124 Fed. 176, 59 C. C. A. 382, and cases there cited. It is true that the cases of *Stokes v. Salstonstall*, 38 U. S. 181, 10 L. Ed. 115, *Transportation Co. v. Downer*, 78 U. S. 129, 20 L. Ed. 160, and *Inland & Seaboard Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, are sometimes cited as announcing a contrary doctrine, but an examination of those cases shows that in each of them the accident itself, which was the proximate cause of the injury complained of, raised the presumption of negligence, and thus supplied the plaintiff with the proof which otherwise he would have been required to make.

The English case of *Christy v. Griggs*, 2 Champ. M. P. Rep. 79, is a leading case on this question. The opinion reads as follows: "I think the plaintiff has made a prima facie case by proving the extent of the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as careful as could anywhere be found. What other evidence could the plaintiff give? The passengers were all sailors, like himself, and how did they know whether the coach was well built, or whether the coachman drove skillfully? In many other cases of this sort it must be equally impossible for the plaintiff to give the evidence required, but, when the breaking down or overturning is proved, negligence on the part of the owner is implied." In *Rose v. Stevens & Condit Co.*, 20 Blatchf. 412, 11 Fed. 439, it was said of the presumption of negligence: "The presumption originates from the nature of the act, not from the nature of the relation between the parties." In *McDonald v. Montgomery*, 110 Ala. 161, 20 South. 317, it was said: "Proof of mere injury, without more, does not raise the presumption of negligence sufficient to impose on the company the burden to prove due care on its part. In order to recover, it is incumbent on the plaintiff to show the accident from which the injury resulted, and the circumstances of such a character as to impute negligence." In *Railway Co. v. Mitchell*, 57 Ark. 421, 21 S. W. 883, the court said: "It is true that the burden is on the

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appellee to show by proof that the railroad company was guilty of negligence. The mere fact that the appellee was injured, without more, was not sufficient to raise a presumption of negligence on the part of the railway company; but the derailment of the car and its overturning, and the injury to the appellee thereby, being in the usual course, the logical inference of negligence might be drawn therefrom. In such a case *res ipsa loquitur*." But this rule applies only when the circumstances are such as to afford just ground for a reasonable inference that, according to ordinary experience, the accident would not have occurred, except for want of due care. If causes other than negligence of the defendant might have produced the accident, the plaintiff is bound to exclude the operation of such causes by a fair preponderance of the evidence. *Wadsworth v. Boston Elevated Ry. Co.*, 182 Mass. 572, 66 N. E. 421. The presumption of negligence has been more frequently applied in cases of passengers than in any other, but there is no foundation in reason or authority for such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relation between the parties. The duty which the law enjoins in the two cases (carriers and noncontract cases) only differs in the degree of care to be exercised. The principle of law involved is the same, and the reason of the rule is not found in the relation between the parties. The presumption arises from the inherent nature and character of the act. No further authorities need be cited in support of this rule.

It is contended, however, that this case should be governed by the rule announced in *Lincoln Street Ry. Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736. In that case the judgment was reversed solely because the trial court instructed the jury that in order to defeat a recovery the burden was on the defendant to prove gross contributory negligence on the part of the plaintiff, and the question in dispute herein was not involved in that case. It was said, however, by the learned judge who wrote the opinion: "In an action for damages for an injury received while being transported by a common carrier, the injury being shown, the burden of proof is upon the carrier to show that it was in no wise at fault." It is quite probable that the trial court gave the instruction complained of because of the statement quoted above. We cannot wholly approve of that expression. It seems clear that it is too broad, and is not a correct statement of the law. It is incorrect to say that the negligence of the carrier is to be presumed from the mere fact that an injury has been done to the plaintiff. A presumption arises from the cause of the injury, or from other circumstances attending it, but not from the injury itself. The better rule is found in *C., B. & Q. Ry. Co. v. Howard*, 45 Neb. 577, 63 N. W. 874, where it is said: "The presumption of negligence, when entertained, must be from proved

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and conceded facts, and from such must be the logical, reasonable, and probable deduction." From the foregoing it would seem clear that the opinion in *Lincoln Street Ry. Co. v. McClellan*, supra, should be modified to conform to the rule announced herein; that the instruction complained of was wrong, because it assumed that the contract of carriage and the injury was the basis of a presumption of negligence. There was no basis for the presumption in the instant case until it was proven that the sudden starting of the car was the cause of the plaintiff's injury. The fact being disputed, the burden of proof was on the plaintiff to establish it by a preponderance of the evidence.

We therefore hold that, in actions against common carriers on their common-law liability for personal injuries, the burden is on the plaintiff to prove that he was a passenger, and was injured by the negligence of the defendant, and the extent of such injuries; that where the nature of the accident, when proven or conceded, is such as to fairly raise the presumption of negligence, proof of such accident, which is the proximate cause of the injury complained of, is sufficient. But where, from the nature of the accident, the presumption of negligence does not arise, as a matter of law, the plaintiff must make proof of the negligent acts of the defendant on which he bases his cause of action.

It is also contended that the evidence was not sufficient to sustain the verdict. But as the judgment must be reversed for another cause, and the case may be tried again, we decline at this time to express any opinion on that question.

For the foregoing reasons, the fourth paragraph of the syllabus to *Lincoln Street Ry. Co. v. McClellan*, supra, is disapproved, and the opinion therein modified to conform to the rule announced above.

The judgment of the district court is reversed, and the cause remanded for a new trial.

CAIN *v.* LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky, Jan. 27, 1905.)

[84 S. W. Rep. 583.]

Passenger Getting Off at Wrong Station—Duty of Conductor.*

Where a girl 15 years old, a passenger on a train, voluntarily leaves it, by mistake, at a station, before her destination is reached, there is no duty of the conductor to discover this fact, and have her return to the train.

Passenger Put Off at Wrong Station—Damages—Duty to Minimize.†

Though a passenger is put off at the wrong station, yet, she there

*As to the care due alighting passengers, see foot-note appended to *Ellis v. Chicago, M. & St. P. Ry. Co.* (Wis.), 12 R. R. R. 122, 35 Am. & Eng. R. Cas., N. S., 122.

†As to the damages recoverable for the wrongful refusal, or failure to carry a passenger, see foot-note appended to *Schmidt v. Cleveland, C., C. & St. L. Ry. Co.* (Ky.), 12 R. R. R. 149, 35 Am. & Eng. R. Cas., N. S., 149.

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being invited by people to remain with them over night, she cannot recover for injury from immediately proceeding in bad weather to walk to her station, if a prudent person under the circumstances would have accepted the invitation to remain.

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by Maud Cain, by next friend, against the Louisville & Nashville Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Sweeney, Ellis & Sweeney, for appellant.

Benjamin D. Warfield, Wilbur F. Browder, and Reuben A. Miller, for appellee.

PAYNTER, J. Maud Cain, who sues by her next friend, bought a ticket at Owensboro for Utica, a station on defendant's line. She boarded a train for her destination, and as the train approached Sutherland, an intermediate station, it was called out, and she avers that the conductor told her it was the station where she was to get off. Thereupon he picked up her valise, and carried it out for her, and just as the train was leaving she discovered the mistake. She avers that it was a cold and sleety day in February; that she was compelled to walk to Utica, some miles distant, reaching there after dark; that in going along she fell through a trestle, and hurt herself; that she suffered physical pain and mental anguish in consequence of her forced journey to Utica. She was about 15 years old at the time of the occurrence, and it was the first time she had been on a train. The defendant denied the material allegations.

The plaintiff's testimony conduces to support the averments of the petition. The defendant introduced two disinterested witnesses, who testified that the plaintiff voluntarily left the train at Sutherland; that she carried her valise from the train herself; that they told her at the time the train was pulling out that it was not the station at which she desired to get off. The conductor testified that he had no recollection of putting her off at Sutherland. But the evidence of the two disinterested witnesses was far more satisfactory than the conductor's, because they had a distinct recollection of what occurred.

The court gave the jury three instructions. Nos. 1 and 3 are as follows: Instruction No. 1: "The court instructs the jury that if they believe from the evidence that on the 17th day of February, 1904, the plaintiff purchased a passenger ticket from the agent of the defendant at Owensboro, Kentucky, for transportation on one of defendant's passenger trains from Owensboro to Utica, a station on defendant's railroad, and she then and there took passage on defendant's passenger train, and before said train had reached Utica, but had only reached Sutherland, a station nearer to Owensboro than Utica, and not the point of her

destination, the agents or servants of defendant notified her that she had reached Utica, and she relied on their statements as true, and got off the train at Sutherland, and did not discover that Sutherland station was not Utica station, and could not discover it in the exercise of ordinary care and caution, considering her age and experience in traveling, and did not discover that she was at the wrong station until the train had left her, and said Utica was many miles from Sutherland, and the plaintiff was compelled to and did walk to Utica station, her point of destination, and suffered physical and mental pain therefrom, and was inconvenienced and annoyed as a direct and proximate result of said walk, the jury should find for her whatever damages she sustained, not exceeding \$2,500, the amount claimed in the petition.” Instruction No. 3: “The court further instructs the jury that if they believe from the evidence that at the time plaintiff got off the train at Sutherland no officer or agent of the defendant company ordered or directed her to do so, or that plaintiff negligently or carelessly got off at said station, and, but for her own negligence and carelessness, she would not have been left at Sutherland, or that the getting off of the train by the plaintiff at Sutherland station was her own negligence and carelessness, then the jury should find for the defendant.” The instructions given were more favorable to the plaintiff than she was entitled to have, but we will not point out wherein they were more favorable, except to the extent that we deem it necessary in this opinion. Instruction No. 1 submitted to the jury the question as to whether the conductor had put the plaintiff off at Sutherland under the circumstances claimed by her. The jury found against her on that question. Instruction No. 3 denied her right to recover if she voluntarily left the train at that point. The conductor had no right to suppose that she would get off the train at a station other than the one for which her ticket called. He had the right to presume that a girl of her age was possessed of sufficient intelligence to remain on the car until her station was called out. So, if she left the train voluntarily at Sutherland, the failure of the conductor to discover that fact, and have her to return to the train, was not a breach of duty. In the case of *Louisville & Nashville R. Co. v. Jordan*, 112 Ky. 473, 66 S. W. 27, an infant eight years old was left at a station other than the one to which it was destined, and the court said: “The law required of appellant that it should exercise the highest degree of care to safely transport appellee to her point of destination. But this duty did not require that appellant’s conductor should act as a special attendant to plaintiff during the journey to see that she did not leave her seat. He had the right to presume that the friends and relations of appellee would not have consented to her going alone upon such a journey unless she was possessed of sufficient intelligence to obey the instruc-

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tions given her to occupy her seat until her destination was reached. His duty was to see after the comfort and safety of the passengers generally, and not one in particular." On the trial of the case the court permitted Wilson and his wife (the two persons whom we have designated as disinterested witnesses) to testify that they invited the plaintiff to remain with them over night. Had she done so, she would have escaped the consequences of the trip through the cold to Utica. This testimony was competent. In the first place, it was not prejudicial to the plaintiff on the question as to whether the conductor wrongfully put her off at Sutherland, because it did not in the slightest degree tend to prove that he had not wrongfully put her off at that point. Under the instructions of the court, notwithstanding this testimony, the jury was authorized to allow her damages for her time and suffering in consequence of her trip to Utica, if it believed the conductor had wrongfully put her off at Sutherland. It was competent evidence to go to the jury, because, if a prudent person, under the same circumstances, would have accepted the invitation to remain with the Wilsons, rather than to have made the trip through the sleet, she is not entitled to recover for injuries resulting therefrom, because she could not be thus allowed to enhance her damages by reason of imprudent conduct. The first instruction was prejudicial to the appellee, because it did not submit this question to the jury. Where a passenger is wrongfully put off of a train in a field or woods, he has the right to go to a place of safety, or, if it is a reasonable thing to do, to proceed to the place of destination, and may recover damages proximately flowing from the wrongful act. If the same passenger is put off in a city or town or other place where reasonably comfortable quarters may be had, he would not have the right to journey in bad weather over bad roads to his destination, which would cause suffering and pain, and recover therefor, for he would thus produce an injury to himself which did not proximately flow from the wrongful act.

As the verdict was for the defendant, we deem it unnecessary to discuss the question of the plaintiff's right to recover for mental suffering; hence we express no opinion on the part of instruction No. 1 relating to that question.

The judgment is affirmed.

ANDERSON *v.* SEATTLE-TACOMA INTERURBAN RY. CO.

(Supreme Court of Washington, Dec. 28, 1904.)

[78 Pac. Rep. 1013.]

Prospective Passenger Forced to Leave Car—Injury from Rails Charged with Electricity—Not a Trespasser—Care Due.*

A person having a ticket for passage on an electric railway from one town to another and return stepped on the front step of a car for the purpose of making the return trip, with the supposition that the closed door there would be opened so as to permit him to enter the car. He was forced from the car at a station, without being given the privilege of entering the car from the other side, and without being directed to leave the company's premises, and without being informed how he could in the nighttime find his way to the place of his destination along the ordinary highways, with which he was unfamiliar: *held*, that he was not a trespasser at the time he stepped on the car nor at the time he walked along the track after he was forced from the car to the town where he boarded the car, but was entitled to reasonable protection from hidden and unknown dangers arising from the fact that one of the rails forming the track was charged with electricity.

Same—Same—Negligence—Failure to Warn—Question for Jury.

Evidence, in an action against an electric railway company for injuries to one coming in contact with an electrically charged rail while walking on the track after he had been wrongfully forced to leave a car at a station, examined, and *held*, that the question of the company's actionable negligence in failing to warn him of the danger was for the jury.

Same—Same—Contributory Negligence—Question for Jury.

Whether one injured by coming in contact with an electrically charged rail, forming a part of an electric railway company's track, while walking on the track after having been wrongfully forced from a car, was guilty of contributory negligence precluding a recovery, *held*, under the evidence, for the jury.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Oscar Anderson against the Seattle-Tacoma Interurban Railway Company. From a judgment of dismissal, plaintiff appeals. Reversed.

James M. Epler, for appellant.

Piles, Donworth & Howe, for respondent.

HADLEY, J. This is an action to recover damages for personal injuries received by the appellant, and alleged to

*As to who are, and are not, passengers, see foot-note appended to *Radley v. Columbia Southern Ry. Co.* (Ore.), 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153; *Long v. Lehigh Valley R. Co.* (C. C. A.), 12 R. R. R. 508, 35 Am. & Eng. R. Cas., N. S., 508.

As to the care due persons, other than passengers, at stations and depots on business, see foot-note appended to *Sullivan v. Minneapolis, etc., Ry. Co.* (Minn.), 11 R. R. R. 725, 34 Am. & Eng. R. Cas., N. S., 725.

As to the care due licensees on tracks, see foot-note appended to *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91; *McConkey v. Oregon R. & Nav. Co.* (Wash.), 12 R. R. R. 267, 35 Am. & Eng. R. Cas., N. S., 267.

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have been caused by the negligence of the respondent. The respondent is the owner and operator of an electric railroad between the cities of Seattle and Tacoma. The appellant's complaint alleges that on the 5th day of October, 1902, he was a passenger on a car of the respondent going from Tacoma to Seattle, and was riding on a ticket purchased by him at Seattle from an agent of respondent, which ticket entitled him to ride on respondent's cars from Seattle to Tacoma and return; that he was on a car of respondent, riding on said ticket, when the car reached a point about four miles from Tacoma, in the direction of Seattle; that the cars were stopped at said point, and one of the men in charge—either the motorman or conductor—twice requested appellant, in a manner amounting to a command, to get off the car; that he did get off and the car at once started, leaving appellant standing beside the track at a station, the name of which is unknown to him; that, upon being forced to get off the car, he at once started back toward Tacoma, and walked on the ties of the railroad bed; that he had proceeded about a mile to a point where the roadbed is upon an embankment elevated some five or six feet, the embankment being quite steep, at which place he saw a bridge a short distance ahead; that for fear of some accident he tried to get off the roadbed and down the embankment, and in his efforts to descend he reached his hand and took hold of one of the rails placed and used by respondent on its track, when he received a terrible electric shock; that the shock was so severe that it rendered him unconscious, threw him prostrate upon the ground, where he lay in an insensible condition for three-quarters of an hour, and on recovering consciousness he found he could not use his left hand, arm, or leg, they seeming to be paralyzed; that he was injured about 6:30 p. m., and after recovering consciousness he dragged himself along by the aid of his uninjured leg until he reached a hotel in Tacoma, about 1 o'clock a. m.; that respondent company had left said rail so charged with electricity in an exposed position with no covering over it, and with nothing to protect any one who should touch it from receiving the full force of the electric charge borne by the rail; that in so doing respondent was guilty of negligence, and that by reason of such negligence appellant was injured without fault on his part. The nature and continuing effect of the injuries are also set forth in detail. The answer is a general denial of the material averments of the complaint, and it also affirmatively alleges contributory negligence. A trial was had before the court and a jury. At the conclusion of the plaintiff's evidence the respondent challenged the sufficiency of the evidence to sustain a verdict in behalf of plaintiff, and moved the court to take the case from the jury and enter judgment in favor of the defendant, as provided by statute. The motion was granted by the court, and judgment was entered dismissing

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the action at plaintiff's costs. The plaintiff has appealed.

The evidence shows that appellant had bought a round-trip ticket for passage over respondent's road from Seattle to Tacoma and return. He had made the trip from Seattle to Tacoma in the afternoon of the day the accident happened. After spending some time in Tacoma, and at about 6 o'clock in the evening, he attempted to get upon one of respondent's cars for the return trip to Seattle. The car was then on Pacific avenue in Tacoma. He approached it from the left side, and just as it was starting he stepped upon the front step. The front door upon that side was closed, and appellant says he thought they were going to open it and let him in, but they did not do so. There is evidence to the effect that, when these cars were afterwards flagged across the Northern Pacific Railroad tracks in Tacoma, the appellant had sufficient time to go around the car and get into it from the other side. But it also appears from the evidence that he did step off at said place, and that the car started again almost immediately, when he stepped back where he had been standing. Whether there was sufficient time for appellant to have gone around the car and entered it from the right side or not, he in any event did not do so, and remained upon the left front step until the car reached the first station out of Tacoma. Upon reaching this station, the motorman opened the door and told appellant he must get off the car. Appellant stepped with one foot onto the station platform, and the car immediately started. He then jumped back upon the car step, and the car was again stopped, when he was forced to get off. When he was told he must get off, he said: "I have got a ticket to go to Seattle. Give me time to get around on the other side and get on the car." But no time was given, and the car immediately moved away. Being thus left, and believing that his business required his return home that night, appellant immediately started back toward Tacoma for the purpose of trying to get a boat for Seattle. By this time darkness had come on, and appellant, being a stranger to the surroundings and unacquainted with the topography and highways of the locality, started to walk upon the railroad track, with the result stated in his complaint.

The trial court, when ruling upon the motion for nonsuit, stated, as shown by the record: "I do not think there is any doubt but what the evidence shows that the defendant neglected its duty to the plaintiff, in not either permitting him to go in the car from the front door, where he was hanging on the outside, or giving him sufficient time to get around to the other side of the train, where he could get in where it was open." The court further stated that he believed appellant would have a cause of action against respondent for wrongfully leaving him at the station, but that he was guilty of negligence when he started to walk on the railroad track,

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and is not entitled to recover for his injuries. The appellant, however, bases his right to recover upon the theory that respondent negligently put him off the car on the right of way when that right of way was in an unsafe condition, and without giving him any notice or warning of the danger. He testified that he did not know of the existence of the electrically charged rail, and there is no evidence to the contrary. This accident occurred on the first Sunday after the road was opened for travel. There is evidence that the newspapers had mentioned the matter of this third rail, but it does not appear that appellant knew about it. The evidence shows that neither the motorman nor the conductor nor any one else notified him or warned him of the danger when he was put off the car. It must therefore be assumed, for the purposes of this discussion, that he was in absolute ignorance of the presence of danger from such a source. It appears that a notice was posted at the station calling attention to this dangerous rail, but in the darkness appellant did not see it, and knew nothing of it. There were some electric lights at the station, but he did not see the notice, and started to walk upon the track in entire ignorance of the presence of any danger not ordinarily to be expected when walking upon a railway track. The respondent claims that, having fenced its right of way and posted the notices as to danger, it thereby discharged its duty in the way of securing the public, and was entitled to use upon its own premises such devices as it chose to operate. It is therefore claimed that appellant was a trespasser upon respondent's premises at the time he was injured, and for that reason cannot recover.

It cannot be said that appellant's presence upon respondent's premises was initiated by trespass. He had by contract and for a consideration first entered upon the premises, and had been carried as a passenger from Seattle to Tacoma. The same contract called for his transportation from Tacoma to Seattle, and he therefore not only had a right to be upon the premises, but was there by the invitation and consent of respondent. The conduct of respondent's agents and employees in forcing him to leave the car is unexplainable in the light of the evidence in the record. Certainly the demand for speed in modern travel does not call for such zeal on the part of the employees of a railway company that time shall not be given a passenger to get aboard when he has already paid his money in the usual manner for his transportation. The fact remains in this instance, however, as appears from the record, that just that thing occurred, and appellant was forced to step from the car upon respondent's right of way. He was therefore not a trespasser ab initio, and certainly not one up to the time he was left in the nighttime at a strange place upon respondent's premises. Being thus left upon the premises where he had a right to be, did

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he thereafter become a trespasser? It is true he was left at a station surrounded by farm houses, but that was only a part of the premises to which he had been invited by respondent when it accepted his money and agreed to carry him as a passenger. He had the right to pass over the entire right of way in respondent's cars, but that right had been denied him. When he was left by respondent he was not directed to leave its premises, but was merely forced from its cars and deposited upon its right of way. He was not informed how in the nighttime he could find his way over the ordinary highways. Being thus left upon the premises, under all these circumstances, did he have no rights greater than those of an ordinary trespasser when he moved along respondent's track? It is true he was not invited upon the premises as a pedestrian, but he was invited to come for business purposes, and we believe, under all the conditions, that he did not become a trespasser in the really tortious sense of that term, even though some elements of technical trespass may have been present. He was in any event entitled to the reasonable protection from injury which one human being owes to another when placed in like situation. Respondent's agents must have known that from common experience the thing appellant was most apt to do was to take the track back to Tacoma. They should therefore have seen that he was advised of the danger of such a course because of the unusual and imperceivable danger to an uninformed traveler. Doubtless he was required to take the risk of all ordinary dangers attending a pedestrian upon a railway track, such as contact with moving trains, falling through bridges, and other usual dangers. But since he came upon respondent's premises rightfully, and did not come as a willful trespasser, we think he was not required to take the risk of such an unusual and hidden danger as this third rail. Its character was unknown to him, and its powerful, death-dealing force was entirely concealed. "The great force that was being carried over the wires gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact." *Clements v. Light Co. (La.)* 11 South. 51, 52, 16 L. R. A. 43, 32 Am. St. Rep. 348. In the case at bar, however, the dangerous agency was not a wire which, when strung upon insulators, may ordinarily be supposed to be charged with electricity, but it was a common rail bearing only the appearance of an ordinary rail of a railway track, and disclosing no connective relations which would render it more dangerous than an ordinary piece of iron. If modern transportation methods involve the use of such concealed, unprotected, dangerous, and deadly devices in places where persons of common ex-

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perience may be expected to come in contact with them, we believe those who use them should not escape liability unless they exercise such a degree of care to warn and protect those who are injured as the circumstances and surroundings reasonably require. Whether such care is exercised in a given case becomes a question of fact for the jury. In a case of this kind the conditions are out of the ordinary, and call for care commensurate therewith. To the uninformed the danger in this rail was as completely hidden as is the danger in the case of a spring gun. It is true spring guns are usually set for the express purpose of inflicting injury or taking life, while this rail was placed without such intention, but to be applied to the useful purposes of commerce and transportation. To one ignorant of the presence of the danger, however, injury follows alike as the result of coming in contact with either device. This court has held that death to an absolute trespasser from the discharge of a spring gun, not set to kill any particular person, makes the one who sets it guilty of murder in the second degree. *State v. Bar*, 11 Wash. 481, 39 Pac. 1080, 29 L. R. A. 154, 48 Am. St. Rep. 890. While the absence of criminal intent may remove this case from the domain of crime, yet resultant damage from neglect to sufficiently guard and warn against what is in itself an entirely concealed death trap is in effect the same as that visited by the spring gun, and is certainly ground for recovery of damages. Whether such neglect exists in this case is for the jury to say, and the same is also true as to whether appellant was guilty of contributory negligence.

The general principle applying to those who go upon premises of another by invitation or inducement for business purposes is well expressed in *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216, as follows: "The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of." The above statement of principle exactly covers the relations of respondent and appellant at the time and place the latter was put off the car. If he had at that place come in contact with this hidden danger, the stated principle would have completely covered this case, without leaving room for argument. The concealed danger was not, however, at that immediate point, but first appeared just outside the station grounds, a few feet away. Unless a radical change of relationship occurred the moment appellant crossed the line between the station grounds and the unprotected third rail, then it did not occur at all. For reasons already stated, we think, as he was not a trespasser in the beginning, he did not become a real trespasser at all, but

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was on respondent's premises by inducement for business purposes, and, being left as he was under the peculiar circumstances, he was not required to measure with exactness any given number of square feet of respondent's right of way which he might occupy, and at the same time feel secure from hidden and unusual dangers, unless he had been warned of the danger. We therefore think the authority quoted is applicable to appellant's situation at the time he was injured. The same principle is sustained in the following cases: *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235; *Nickerson v. Tirrell*, 127 Mass. 236; *Davis v. Central Congregational Society*, 129 Mass. 367, 37 Am. Rep. 368; *Beck v. Carter*, 68 Y. N. 283, 23 Am. Rep. 175; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282; *Hayward v. Merrill*, 94 Ill. 349, 34 Am. Rep. 229; *Hartwig v. C. N. W. Ry. Co.*, 49 Wis. 358, 5 N. W. 865.

Respondent cites a number of cases where the relationship in the beginning was that of trespasser, and so continued until the time of the injury. Such, as we have seen, was not true here. In *Ham v. President, etc. (Pa.)* 26 Atl. 757, 20 L. R. A. 682, cited by respondent, a passenger was wrongfully ejected from a train, and was afterwards killed while walking upon the track. The standard set in that case was that the deceased should have left the track "at the earliest practicable opportunity that a reasonably prudent man would have discovered and seized, and that the plaintiff had the burden of proof that he did so." The question was left to the jury. The same case is also cited by respondent as reported in 21 Atl. 1012, in which the court uses the language that nothing short of "imperious necessity" would have excused the deceased in continuing on the track, but the opinion on the second appeal clearly established the rule above stated as to prudence and care, and left it for the jury to decide the fact in that regard. *Benson v. Central Pac. R. Co. (Cal.)* 32 Pac. 809, also cited by respondent, was a case where a six year old child was carried with her father beyond her station. She and the father walked back upon the railroad track, and the child was struck by a train. Recovery was denied. The accident happened in broad daylight, and, as we have already intimated, one walking upon a railway track under such circumstances, although not a trespasser from the beginning, must, in the absence of wanton negligence on the part of the railway company, take the risk of such ordinary dangers as the running of trains, but that a different rule should apply where a concealed deadly agency is strung continuously along the track, and of which the pedestrian has received no notice. *Webster v. Fitchburg R. Co. (Mass.)* 37 N. E. 165, 24 L. R. A. 521, was a case where a person in possession of a ticket, while running across the company's tracks outside the passenger station, apparently to catch a train about to start, was struck and killed by

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another train. Recovery was denied on the theory that he had not yet become a passenger. In any event, whether he was such or not, he was required to look out for such known dangers as running trains when he was upon the tracks. The facts of other cases cited by respondent, we believe, do not bear sufficient analogy to the facts of this case to make a discussion of them profitable here. For these reasons, we think the questions of negligence and contributory negligence, under the evidence as introduced, were for the jury under proper instructions. We therefore think the court erred in withdrawing the case from the jury.

The judgment is reversed, and the cause remanded with instructions to proceed with a new trial.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ. concur.

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(Supreme Court of Missouri, Division No. 1, Nov. 25, 1903.)

[77 S. W. Rep. 70.]

Injury to Passenger—Care Due Passenger Riding on Steps.

A street railway company assuming to carry a passenger standing on the steps of the platform of the car, outside of the gate, and on the side next to the other track, on which cars run in the opposite direction, is chargeable with the duty of carrying him safely in that position, if it can be done by that high degree of care which the law requires the company to observe towards its passengers.

Care Required of Street Car Passenger Riding on Steps.*

A street car passenger taking a dangerous position by standing on the car steps, outside of the gate, and on the side of the adjacent track, on which cars run in the opposite direction, is required to exercise that degree of care for his own safety which prudent persons under like circumstances would observe.

Injury to Passenger Riding on Steps—Negligence—Question for Jury.

A street car passenger, because of the crowded condition of the car, stood on the step of the front platform of the car, outside of the gate inclosing the platform, and on the side next to the track on which cars were operated in the opposite direction. The motorman saw him, and warned him that it was a position of danger. The conductor saw him, and, without warning, collected his fare. It was feasible to carry a passenger safely in that position. The company carried men safely in that position, and carried this passenger for about two miles, when he was injured by the car and a car traveling on the other track coming nearly in contact with each other at a curve in the road, because of a violation of the rules of the companies operating cars on the tracks, governing the passing of cars at curves. There was nothing to show that the passenger was guilty of negligence after taking his position on the step: *held*, that the question of defendants' negligence was for the jury.

Same—Same—Same—Contributory Negligence.

Though the act of the passenger in taking the position on the step was an act of negligence, which contributed to his injury, the question

*As to the care required of a passenger for his own protection, see foot-note appended to *Lauterer v. Manhattan Ry. Co.* (C. C. A.), 13 R. R. R. 295, 36 Am. & Eng. R. Cas., N. S., 295.

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of the negligence of the motorman, knowing the position of the passenger, running his car into the curve in plain view of the car on the other track, was for the jury.

Same—Assumption of Risk—Pleading.

The petition in an action by a street car passenger for injuries alleged negligence of defendants in bringing their cars in close proximity while meeting on a curve. The answer consisted of a general denial and a plea of contributory negligence, in taking a dangerous position on the step of the platform of the car, outside of the gate, and on the side next to the other track: *held*, that an additional plea alleging that the passenger knew, or by ordinary care might have known, the situation of the tracks, and that the danger of riding on the step was known, or by ordinary care might have been known, to the passenger, and that he assumed the risk, if intended to charge that his injuries resulted solely from his voluntary act of riding on the step, was covered by the plea of general denial.

Same—Same—Same.

If the pleader intended to allege that the position was so dangerous that injury to the passenger could not have been avoided by the exercise of the care incumbent on the carrier, and that the danger was obvious or known to the passenger, the plea was defective for failing to so allege.

Same—Same—Same.

If the plea intended to allege that the passenger's negligent act of riding on the step contributed to his injury, it was covered by the plea of contributory negligence.

Same—Assumption of Risk—Negligence.

A street railway passenger never assumes the risk of the company's negligence.

Instructions.

A fact about which there is no dispute, and which is conceded to be true notwithstanding the allegations in the pleadings, may be assumed in an instruction to be true.

Same.

Where there was some evidence that the car of the other company stopped after entering the curve at a point where the danger was greatest, an instruction that such company was not liable, if at the moment of the accident its car was not passing through the curve, was properly refused, because authorizing a verdict for it if its car had stopped after entering the curve.

Excessive Verdict.

Where there was nothing to indicate that the verdict in a personal injury action was not the result of calm judgment, the court on appeal will not disturb it as excessive.

Appeal from Circuit Court, St. Louis County; Jno. W. McElhinney, Judge.

Action by James J. Parks against the St. Louis & Suburban Railway Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

McKeighan & Watts and Robt. A. Holland, Jr., for appellants.

Wm. R. Gentry, for respondent.

VALLIANT, J. Defendants, two street railway companies, appeal from a judgment for \$5,000 recovered against them in the circuit court of St. Louis county by the plaintiff on account of personal injuries alleged to have been received

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by him through their negligence. There is not much dispute as to the governing facts of the case. In June, 1900, there was a strike among the employees of all the other street railroad companies in the city of St. Louis, and the only street cars running were those operated by the defendant companies. The consequence was the cars of these two companies were crowded with passengers beyond their normal carrying capacity. People crowded in, filling the bodies of the cars, the platforms, and every part where a seat or foothold could be obtained. Plaintiff on June 14, 1900, boarded a west-bound car of the St. Louis & Suburban Railway Company, which we will call the Suburban car, at the crossing of Fourteenth street and Franklin avenue. The car was crowded with passengers to such an extent that the only space plaintiff could obtain on it was standing room on the step of the front platform, outside of the gate that inclosed the platform. There was another man and a boy standing on the step in the same attitude plaintiff took. During the period of this strike, it was not unusual for men to ride on the steps of the platforms, outside the gates, as those men were doing. At the point where plaintiff boarded the car the defendant's railway runs north and south, but a short distance after passing Franklin avenue it turns west, which is its main course. It is a double-track road, and the cars of both defendant companies run over it. The step on which the plaintiff took his position was on the west side of the car going north, which would become the south side after it turned west, and was the inside; that is, the side next to the other track, over which the east-bound cars came. The outside line of the step on which the plaintiff stood was on a line with the outside of the car, but the plaintiff's body projected beyond that line. He could not press himself closer in. The motorman saw the men and the boy on the step, and told them it was dangerous to ride there, and that they ought to try to get on the other side, but they did not change their position. The conductor also saw the plaintiff there, and asked him for his fare while he was in that position, and received it. The plaintiff rode standing on the step, outside the gate, from Fourteenth street to a point just beyond Vandeventer avenue, a distance of probably two miles or more, where the accident occurred. In going that distance the car passed around two or three curves, and met several cars east-bound on the other track. Just west of Vandeventer avenue the tracks of the defendant companies curve to the north, and then turn again to the west. Cars going in opposite directions, meeting in this curve, were brought more or less nearly in contact, according to the point in the curve at which they passed each other. The space between cars thus passing was variously estimated by different witnesses, but the testimony of all of them showed that at some point in the curve the meeting cars would come so close to each other that extra care

was to be observed to avoid contact, and it was made the subject of especial regulation. The printed rules of the companies gave the east-bound cars the right of way in the forenoon, and the west-bound in the afternoon. Plaintiff was on a west-bound car, and it was about 5 or 6 o'clock in the afternoon, so that this car had the right of way. The rules also required the car that did not have the right of way to come to a stop 40 feet before entering the curve, to allow a car coming in the opposite direction to pass through the curve without danger of contact. On this occasion, as the Suburban car going west approached this curve, a car of the St. Louis & Meramec River Railroad Company, which we will call the Meramec car, approached it from the opposite direction. Each of these cars was in plain view of the motorman in charge of the other. There is some conflict in the evidence as to whether the east-bound car stopped at all before the accident, but, if it stopped at all, it did so very close to or just at the entrance of the curve. There is also some conflict as to the speed at which the Suburban car entered the curve and was going when the accident occurred. But whatever the truth about those disputed points may be, the fact is that the position of the Meramec car in reference to the curve was such, and the movement of the Suburban car into and around the curve was such, as that the plaintiff's body was brought into violent contact with the Meramec car, and he was rolled between the two cars until the space between them became wider, and he was dropped to the ground, having received serious injuries.

1. Appellants' first proposition is that the court erred in refusing the instruction in the nature of a demurrer to the evidence which defendants asked. The substance of the proposition is that the position taken by the plaintiff on the step of the platform was so obviously dangerous, and it so obviously contributed to the accident, that the court should have adjudged the plaintiff, on his own evidence, guilty of contributory negligence. There are two standpoints from which this proposition is to be considered:

(a) That the plaintiff's position was one of danger, and that he would not have been injured if he had not been where he was, are facts indisputable. But was he guilty of negligence in being there? We need not dwell on the fact that the car was so crowded he could not get on it in any other position, because he was not compelled to get on it at all. His taking passage on the car was a voluntary act. Traveling on a street car in a great city is always attended with danger, whatsoever position in or on the car the passenger may assume. But if it is a position that the carrier offers to the passenger, or a position which the carrier assents to his taking, and knowingly assumes to carry him in that position, then it becomes the duty of the carrier to carry him safely in that position, if it can be done by the exercise of

that high degree of care which the law requires the carrier to observe for the safety of its passengers. The degree of care to be observed by the carrier in such case must be in proportion to the danger which the passenger's position entails. The more dangerous the position, the greater the care the carrier is bound to observe. And at the same time the law imposes on the passenger in like case the duty of observing for his own safety the care that a man of ordinary prudence under like circumstances would observe, and that care, too, must be in proportion to the apparent danger. The more dangerous the position, the more care a prudent man would be expected to observe. It is the duty of a carrier who has undertaken to carry a passenger in such a position to carry him safely, if it can be done by the exercise of the degree of care above mentioned; and it is correspondingly the duty of the passenger, after he has taken that position, to observe such care for his own protection as an ordinarily prudent man in a like position and under like conditions would naturally be expected to observe. Under those circumstances, if the passenger is injured from a cause arising out of or incident to the position itself, without failure of duty on the carrier's part, the carrier is not liable. And though in such case the carrier fail to perform its duty, and that failure results in the accident, still, if the passenger fails also in his duty as above defined, and his failure contributes to bring about the result, he cannot recover. But in judging the conduct of both carrier and passenger we must look only to conduct after the passenger has assumed the position, not charging the position itself to either as an act of negligence, but requiring both to keep in mind the peril incident to the position, and regulate their conduct in reference thereto. In this case the carrier knew the position the passenger had taken, and assented thereto, and undertook to carry him in that position. We say this because the motorman saw him there, and warned him that it was a position of danger, and the conductor saw him there, and, without warning and without remonstrance, asked him for his fare, and received it. If that had been a position of such danger that the carrier was unwilling to assume the duty of carrying the plaintiff therein, the carrier had the right to require the plaintiff to leave the car. It was an unusual position—one involving more than usual risk—and the carrier had the right to refuse to carry him in that position. But unless some other circumstance or condition arose to increase the hazard, it was feasible to carry a passenger safely in that position. This is shown by the fact that during this period of overcrowded cars the defendants did carry men safely in that position, and especially by the fact that this plaintiff was carried safely from Fourteenth street to Vandeventer avenue, passing en route many cars on the other track, and passing through two or three other curves.

There is no act of the plaintiff after taking his position on the step that is complained of as negligence. The foregoing views accord with former decisions of this court. *Huelsenkamp v. Ry. Co.*, 37 Mo. 537, 90 Am. Dec. 399; *Willmott v. Ry. Co.*, 106 Mo. 535, 17 S. W. 490; *Seymour v. Ry. Co.*, 114 Mo. 266, 21 S. W. 739.

(b) But assuming that taking the position on the step of the platform was itself an act of negligence, and that it contributed to the occurring of the accident, still there was a question for the jury. The motorman and conductor both knew the man was there, and knew the peril of his position. They also knew that he could not jump from the car while it was passing through the curve without the risk of falling and being run over by the approaching east-bound car, or of being run over if he did not fall. Yet, in plain view of the other car, and seeing that it had not stopped as the rules of the company required, and as common sense dictated, the motorman of the Suburban car ran his car into the curve and on until he had crushed the plaintiff's body against the Meramec car. The facts of this case make a strong example of the wisdom of the rule which allows a plaintiff in exceptional cases to recover, notwithstanding his own contributory negligence, when the defendant sees the plaintiff's peril, and, although able by ordinary care to avoid it, yet recklessly or wantonly inflicts the injury. *Kelley v. Ry.*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783; *Morgan v. Wabash R. Co.*, 159 Mo. 262, 60 S. W. 195.

The court did not err in refusing an instruction looking to a nonsuit.

2. The plaintiff's petition stated his cause of action based on alleged negligence of the defendants in bringing their cars into collision, or such close proximity as to cause the plaintiff's injuries. The answer of the defendants consisted of a general denial, a plea of contributory negligence based on the act of the plaintiff in taking the dangerous position on the step of the platform, and then followed what in their brief the learned counsel for appellants call a plea of assumption of risk, which is as follows: "And for a further defense defendants state that all the details of defendants' tracks, and the manner of operating cars thereon, were known to plaintiff, or by the exercise of ordinary care might have been known to plaintiff, and that the danger of riding upon the southern steps of the front platform of the west-bound car was known to plaintiff, or by the exercise of ordinary care might have been known to plaintiff, and that plaintiff assumed the risk of riding upon said part of said car on said occasion." Appellants now complain that the instruction given at the request of the plaintiff ignored the defense set up in that plea. That is not a good plea. The fact that the plaintiff had negligently taken a position on the platform step, outside the gate, was a fact already properly pleaded as an

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act of contributory negligence. To the plea of contributory negligence the plaintiff replied, and the issue was properly joined. But the part of the answer above quoted, and which appellants call their plea of assumption of risk, presents no affirmative defense. If it is intended by that plea to say that the plaintiff's injuries were the result solely of his voluntary act of riding on the step of the platform, then it means that the injuries were not the result of the defendants' negligence, which defense was already covered by the plea of general denial. The petition having charged that the plaintiff's injuries were caused by the defendants' negligence, and the defendants having denied that charge, they were at liberty, under their general denial, to prove anything to show that the plaintiff's injuries did not result from their negligence. That which can be proven under the general denial already pleaded is improper to be specially pleaded. If the pleader intended to say that to ride in that position was so dangerous that injury to the plaintiff could not have been avoided by the exercise of the care incumbent on the carrier, and that the fact that it was so dangerous was obvious or known to the plaintiff, then the fault of the plea is that it does not say that; and, in the light of the evidence, if it had said so, the court would not have committed error in ignoring it in the instructions, because there was no evidence to support it. All the evidence shows that the accident would not have occurred if the motorman had used even ordinary care. If by that plea it was intended to say that the plaintiff's negligent act of riding on the step, joined with the defendants' negligent act of attempting to pass two cars in a space that was not wide enough for them to pass in safety, and that thus the plaintiff contributed to cause his own injury, that defense was already covered by the plea of contributory negligence. But if it was intended by the plea to say that the plaintiff, by voluntarily taking that position, released the defendants from their duty to exercise the degree of care due from the carrier to the passenger, or if it was intended to say that by taking that position the plaintiff assumed not only the risk incident to it, but assumed also the risk of the defendants' negligence, then it was not a good plea. The passenger never assumes the risk of the carrier's negligence. There is always a risk of personal injury to a person traveling, even if there be no negligence either on his own part or on the part of the carrier. That risk is incident to the act of traveling, and is greater or less according to the circumstances and conditions. That risk the passenger assumes. But if to the danger incident to the act of traveling under the circumstances and conditions of the particular case is added a danger caused by the negligence of the carrier, the passenger does not assume the risk of those combined dangers. If the catastrophe in question did not result alone from the danger incident to the act of traveling under the given circumstances

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and conditions, but resulted because to that danger was added the consequence of the negligent act of the carrier, there was no such assumption of risk as would relieve the carrier from liability. Assumption of risk is one thing, and contributory negligence is another. *Curtis v. McNair* (Mo. Sup.) 73 S. W. 167. The court did not err in ignoring that plea in its instructions.

Instruction No. 3 given for the plaintiff begins as follows: "The jury are instructed that if you believe and find from the evidence in this case that the servants of defendant St. Louis & Meramec River Railroad Company, who were in charge of its said east-bound car on the occasion mentioned in the evidence, prior to and at the time of the alleged injury to plaintiff, were not exercising ordinary care to avoid said collision," etc. Appellants complain of this instruction because they say that by the use of the words "said collision" it assumes that there was a collision, instead of submitting the question to the jury. There was no dispute on that point. The evidence of defendants showed that there was a collision, as well as that of the plaintiff. Although the general denial met every fact stated in the petition in issue, yet a fact about which there was no real dispute, and that was conceded at the trial, may be assumed in an instruction.

The defendants asked five instructions, marked B, C, D, E, and F, the effect of which were that the plaintiff, by taking the position of obvious danger on the step of the platform, was not entitled to recover. From what we have above said, it will appear that there was no error in refusing those instructions.

Instruction G asked by defendant was to the effect that, if the Meramec car at the moment of the accident was not passing through the curve, the verdict should be in favor of the Meramec Company. That instruction called for a verdict for that defendant, even though the Meramec car had stopped after it had entered the curve, as some of the evidence tended to show, at a point where the danger was greatest. It was not error to refuse that instruction.

3. It is earnestly argued that the damages awarded by the jury are excessive. We do not deem it necessary in this opinion to discuss the evidence bearing on this point. It is sufficient to say that the assessment by the jury is not so much out of the way as to justify us in invading their peculiar province. There is nothing to indicate that it is not the result of calm judgment, and we will not disturb it.

We find no error in the record and therefore the judgment is affirmed. All concur.

CHOCTAW, O. & G. RY. CO. *v.* STATE.

(Supreme Court of Arkansas, Dec. 24, 1904.)

[84 S. W. Rep. 502.]

Carriers—Discrimination—Preference of Owners of Spur Tracks.*

Where all shippers in the same situation at a given point on a railroad are treated alike in the matter of furnishing coal cars, the mere fact that shippers who own spur tracks are furnished cars in preference to those who do not own tracks, but require the use of the railroad's side tracks, which are needed by the railroad to conduct its general business and serve the public, is not a discrimination, within Const. art. 17, § 3, providing that all persons shall have an equal right to transportation on railroads, and forbidding undue or unreasonable discrimination.

Same—Same—Same.*

Nor is such preference a violation of the act of March 11, 1899 (Acts 1899, p. 82, c. 53), providing a penalty for unlawful discrimination.

Appeal from Circuit Court, Sebastian County; Styles T. Rowe, Judge.

■ Suit by the state against the Choctaw, Oklahoma & Gulf Railway Company. From a judgment for the plaintiff, defendant appeals. Reversed.

■ E. B. Pierce, for appellant.

Ben Cravens, Pros. Atty., James Brizzolara, and Jos. M. Hill, for the State.

WOOD, J. This is a suit to recover of appellant penalties under the act of March 11, 1899 (Acts 1899, p. 82, c. 53), for alleged unlawful discrimination against one Arthur L. Rogers, in failing to furnish him cars for shipping coal, while furnishing same to other shippers at the same station. The facts alleged to constitute discrimination do not differ in essential particulars from the facts relied on in the case of *Harp v. Choctaw, Oklahoma & Gulf R. Co.*, recently exhaustively considered by the learned federal court of the Western District of Arkansas in 118 Fed. 169, and again on appeal by the Circuit Court of Appeals, in 125 Fed. 445, 61 C. C. A. 405. The law declared in these cases on the question of unlawful discrimination is well supported by authority. Moreover, the Harp Case is thoroughly in line with the doctrine announced by this court in *L. R. & Ft. S. R. Co. v. Oppenheimer*, 64 Ark. 271, 43 S. W. 150, 44 L. R. A. 353. We follow the Harp Case, and adopt the following language of Judge Thayer, as strictly applicable to the undisputed facts in this record: "The idea conveyed by the word 'preference' is that, as between two persons occupying the same situation or relation to the carrier, one has been preferred over the other, or

*See foot-note appended to *State v. Chicago, etc., R. Co.* (Neb.), 13 R. R. R. 336, 36 Am. & Eng. R. Cas., N. S., 336.

granted certain privileges or facilities that were not extended to the other. Such is not the case which the evidence discloses. The plaintiff had not provided himself with a spur track leading to his mine for the storage of cars, while other shippers had done so. He desired to make use of the defendant's side track to stand cars thereon while he loaded them by the slow process of hauling coal to the station in wagons, and shoveling it thence into the cars. The privilege which he demanded was essentially different from that accorded to other shippers, who had built spur tracks on which cars could be placed and handled by the defendant with much less inconvenience and risk than when standing on its house tracks, which it used for handling other commodities, and for switching purposes, and probably used at times for the passage of trains. We fail to see how the delivery of cars to other shippers of coal on spur tracks which they had caused to be built can be fairly said to have been a preference extended to them, or a discrimination against the plaintiff, who desired to use the defendant's house tracks. The privilege which the plaintiff demanded was not accorded to other shippers nor a substantially similar privilege. We think, therefore, that he has no just cause for complaint on this ground."

Learned counsel seek to differentiate the facts of the Harp Case from the facts shown in this case by setting out certain things that were proved in the Harp Case that appellant did not prove in this case. But these were nonessentials. In the Harp Case appellant may have proved more than was necessary to make good its defense. In this case it established enough.

The testimony of Rogers shows conclusively, at pages 69, 70, 71, and 72 of the record, that he was demanding cars to be placed on the tracks of the appellant at Hartford, which were by the railroad company in its general business, to be loaded by him with wagon; and at the time he was demanding these cars to be so placed, appellant was furnishing cars to shippers who had private spur tracks, that were only used for the purpose of hauling coal, and did not interrupt the company's general business at all. On these spur tracks running out to the mines, the cars were placed, and, except for a very short interval, the shippers all loaded the cars with coal by tippie, and not by wagon.

To constitute actionable discrimination, the law contemplates an undue preference—some undue, unjust, or unreasonable discrimination. Const. Ark. art. 17, § 3; Ry. v. Openheimer, 64 Ark. 271, 43 S. W. 150, 44 L. R. A. 353. So long as those who are in substantially the same situation with reference to the carrier and the commodity to be shipped are treated with the same consideration and accorded the same privileges, there can be no actionable discrimination. And

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there can be no actionable discrimination between those whose situation and relations to the carrier with reference to the commodity to be shipped are so different as to justify or demand a difference in treatment. For example, in the matter of furnishing cars for the shipment of coal from any given station, the railway company may, and doubtless should, adopt a different rule for those who load by tippie on cars placed on their own private tracks, used exclusively for handling coal, from that it applies to those who load by wagon, on cars placed on the tracks of the company, used for their general business. For in the former case the carrier would not be seriously interrupted in the discharge of its duty to the public in the transportation of passengers, as well as all classes of freight, while in the latter case it would be. It is conceded, and the law is well settled, that the railroad company had a right to make reasonable regulations upon which it would receive the commodities that it undertook to carry. In view of the serious impediment that would be placed in the way of the railway company in the conduct of its business, and the discharge of its duties to the traveling and shipping public, should the demands of appellee to be furnished cars in the manner indicated be complied with, we think the conditions imposed upon him, and other shippers similarly situated, for the receiving and shipping of coal, were not unreasonable. See, especially, opinion of Judge Rogers on this point in the Harp Case, *supra*.

We find nothing in the record to warrant the conclusion that the difference in treatment of shippers at Hartford in the matter of furnishing coal cars was for the purpose of favoring one shipper's business over that of another. All in the same situation were treated exactly alike, and the conduct of the railroad company in the premises seems to have been superinduced by a desire to serve the public in the safest and most expeditious manner, rather than by a desire to pull down one man's business while building up another.

The statute making it the duty of the railway companies, under the law, to "furnish without discrimination or delay, equal and sufficient facilities," affords appellee ample remedy for all damages he may have sustained by reason of any failure upon the part of the appellant to furnish him any facilities for transportation to which he may have been entitled. But this is not an action for failing to furnish facilities. Appellee seeks to recover, under a highly penal statute, for unlawful discrimination. To do this, he should bring his case within the prerequisites declared in *Ry. v. Oppenheimer* and *Harp v. Ry.*, *supra*. The thoroughness with which these cases were considered has saved us much labor in this. The writer did not concur in the *Oppenheimer* Case, and, were this an original question with us, might have a different view now. While the facts in the *Oppenheimer*

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Case were different, the principle announced and applicable there is the same here.

Many other questions were presented, but it is unnecessary to decide them.

The judgment is reversed, and the cause remanded for new trial.

GEORGIA SOUTHERN & F. RY. CO. v. JOHNSON, KING & CO.

(Supreme Court of Georgia, Nov. 11, 1904.)

[48 S. E. Rep. 807.]

Carriers of Goods—Limiting Liability—"Released."

Since, in this state, public policy prevents a carrier from contracting against the results of his own negligence, the contract to ship goods "released" must be construed to mean that he is only relieved from losses occasioned without his negligence.

Same—Same—Burden of Proof.*

Where goods are shipped "released," the burden is upon the carrier to show that the loss was within the exemption, and not occasioned by his negligence. Civ. Code 1895, § 2265.

Conversion.

Where there is a suit for a conversion, the wrongdoer cannot take advantage of an agreed valuation of the property in order to lessen the amount of his liability.

Limiting Liability—Valuation of Shipment.

Where the carrier arbitrarily fixes the value of a particular consignment, or where, by the terms of the printed bill of lading, there is an arbitrary fixing of value before the goods are inspected, and without regard to their real worth, the same will be treated as a mere attempt to limit liability, and not a bona fide attempt to value the property shipped.

Same—Same—Loss of Goods—Estoppel.

But where, by the act of the parties, there is a bona fide valuation, or where the contents of packages are unknown to the carrier, and the valuation is placed thereon by the shipper, who thereby gets a lower rate of freight, and the goods are lost or damaged, the shipper is estopped from recovering beyond the valuation thus fixed by him.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Johnson, King & Co. against the Georgia Southern & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

This case was tried on an agreed statement of facts, from which it appeared that the plaintiffs in the court below filled out duplicate shipping tickets, signed the same, and sent them, with shipments of candy, to the company's depot. The contents of the packages were unknown to the carrier, except as indicated by the tickets. One of the duplicate re-

*As to the burden of proving the carrier's liability when the liability is limited, see foot-notes appended to *Cau v. Tex. & Pac. Ry. Co.* (U. S.), 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303.

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ceipts signed by the plaintiffs was retained by the company, and the other, signed by its agent, was returned to the plaintiffs. The boxes contained candy, which, under the classification of freights in effect at the time, could be shipped either as first or fourth class; confectioneries—namely, candy, bonbons, and confectionery not otherwise specified—being shipped as first class at a high rate. Such shipments, "with value limited to six cents per pound, and so expressed in the bill of lading," are shipped as fourth class, and at a considerably lower rate. On the shipping tickets prepared by the plaintiff in the present case, and others used by the company, there was printed, "Candy released six c. per pound valuation; entire shipment released;" this stipulation being for the purpose of securing the rate of freight applicable to fourth-class shipment under the Southern classification. It was agreed that some of the goods had been damaged and others lost. The company conceded its liability on the basis of six cents per pound, and tendered the amount thus calculated to the plaintiffs, who declined to receive the same, insisting that they were entitled to the real value. The judge so found, and the carrier excepted.

John I. Hall, R. C. Jordan, and Geo. S. Jones, for plaintiff in error.

Lane & Park, for defendant in error.

LAMAR, J. The word "released," as used in contracts of shipment, has, from usage, acquired a well-defined meaning, though as yet it does not seem to have been judicially construed. No doubt the effect given the term will vary in the different courts, according as the law of the state permits or prohibits contracts against the results of negligence. In this state, where public policy forbids such limitation, the word must be held to mean only that the shipper agrees to relieve from all liability as against which the law allows the carrier to exempt itself by contract. See *Cooper v. Raleigh & Gaston R. Co.*, 110 Ga. 662, 36 S. E. 240; *Hutchinson on Carriers*, § 250. But even in such cases the presumption is against the carrier, and the burden is upon it to establish that the loss was within the exception, and not occasioned by its own negligence. Civ. Code 1895, § 2265. Here there was no explanation of the circumstances attending the loss, and, admitting its liability, the carrier tendered to the plaintiffs the value of the goods as named in the shipping receipt. This was declined, and the suit was continued for the purpose of recovering the real value of the articles shipped.

In an action of trover or damages for conversion the tortfeasor could not take advantage of his own wrong, nor lessen the measure of his liability, by invoking an agreed valuation which the plaintiff may have made for the purpose of reducing the freight rate or securing like collateral advantage. *Sav., F. & W. Ry. Co. v. Sloat*, 93 Ga. 803, 20 S. E. 219.

And where there is only a pretended valuation the same is true; as, for example, where clothes were valued by the hundred pounds. It would have been equally arbitrary, but with more appearance of reason, to value them by the yard. But in either case it was a mere attempt to prearrange the amount of damages in case of loss. *Ga. R. Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197. So, limitations in the printed bill of lading, stating that the company will not be responsible for loss of particular classes of goods beyond a specified amount. Such figures are named without inspection, before the goods are offered, and independently of the real worth of the property. In most of the forms there is not even a pretense of valuation, but an express stipulation that the goods shall be taken as worth not more than a given sum, or that the company will not be liable beyond a given amount. Such stipulations are mere prearrangements as to the amount of damage, and will not be enforced so as to exempt a negligent carrier from liability for the true value. *Wood v. So. Ex. Co.*, 95 Ga. 452, 22 S. E. 535. And this is so whether the shipper merely accepts a bill of lading containing such stipulation or assents thereto in writing. *Central of Ga. Ry. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720. Candies do in fact vary in quality and value from the cheapest stick candy to expensive French candies. A classification, therefore, according to value, is not arbitrary. Neither is it unreasonable or unlawful for the rate to be proportioned with reference to the value and to the amount for which the carrier should be held responsible in the event of loss. Freight rates are not based solely upon the weight of goods and the space they will occupy in the cars. Nor does diligence require that all goods shall receive the same care. Some may be properly loaded on open cars; others may be forwarded by regular freight trains; others, on account of their perishable nature, must be sent by fast freight; others, because of their great inherent value, must be shipped under special precautions to prevent loss by theft. The difference in the quality and value may create a difference in the cost of shipment. The carrier is entitled to some compensation on the basis of the difference in care and expense attending the shipment, and also for the greater or less liability in case of loss or damage. He is primarily an insurer, and as much entitled to a premium as an insurance company. If the latter may charge more for insuring goods worth \$5,000 than for those worth \$1,000, so may the carrier, for the risk incident to handling candy worth \$1 per pound, charge more than when he hauls that worth only 6 cents a pound. Here the shippers had an option. They could have forwarded the goods without any statement as to their classification or valuation, and in case of loss would have been entitled to stand upon their common-law right, instead of which they classified and valued. The contents of the boxes were un-

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known to the company. The statement on the ticket put the goods in the fourth, instead of the first, class, as completely as if they had been called canned goods, or any other article listed in the fourth class. The carrier had the right to rely on the classification and valuation made by the owner. It fixed a rate based on such valuation. The shipper got the benefit of the rate, and the carrier suffered the loss. And, while there is much conflict on the subject, the previous rulings in this state recognize that the shipper is estopped by such valuation, and cannot recover beyond that amount where the loss was not occasioned by the carrier's conversion. *Central of Ga. Ry. Co. v. Murphey*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; *Ga. R. Co. v. Keener*, 93 Ga. 810, 21 S. E. 287, 44 Am. St. Rep. 197; *Southern Ry. Co. v. Horner*, 115 Ga. 381, 41 S. E. 649 (2). But it is claimed that the bills of lading prepared by the company contained a stipulation that "candy valuation six cents released" went forward as fourth class and on the lower rate; that this was an arbitrary valuation, and a mere attempt to prearrange the amount of damages in case of loss. But the sufficient answer to this proposition is that here the contract of shipment was not evidence by such instrument. Nor can we know from the record the other terms of such bill of lading, nor whether thereby the shipper had an option. But even in the case of bills of lading containing such stipulations, if the contents of the package and value are unknown, and the carrier relies on the valuation made by the parties, and basis its rate accordingly, the mere fact that the appropriate bill of lading has been printed in advance, and to meet the requirements of a particular class of business, and to save having to write out the proper contract, would not change the principle. It comes back always to the question as to whether there has been a bona fide valuation or whether there is only an attempt by the company to limit liability regardless of value.

Judgment reversed. All the Justices concur.

HORNSTEIN v. RHODE ISLAND CO.

(Supreme Court of Rhode Island, Sept. 26, 1904.)

[59 Atl. Rep. 71.]

*Street Railways—Injuries to Pedestrians—Contributory Negligence.**

One who crosses a street car track in front of a car which he sees approaching him, at a time when he is not required to cross by any emergency, and is injured, is guilty of contributory negligence.

Case for negligence by Samuel Hornstein against the Rhode Island Company. On petition of defendant for new trial. Petition granted, and judgment ordered for defendant.

*See foot-note appended to *Roenfeldt v. St. Louis & S. Ry. Co.* (Mo.), 13 R. R. R. 470, 36 Am. & Eng. R. Cas., N. S., 470.

State ex rel. Crandall v. Chicago, etc., R. Co

Argued before STINESS, C. J., and TILLINGHAST and DUBOIS, JJ.

Page & Page & Cushing, for plaintiff.

Henry W. Hayes, Frank T. Easton, and Lefferts S. Hoffman, for defendant.

STINESS, C. J. The plaintiff testifies that when he stepped off the curbing to cross the street the car was quite a distance away from him, and he tried to cross the track in front of it. He says there was nothing in the way, and he saw the car; that the car was coming moderately, but raised the speed when he started to cross. When he stepped upon the first rail he saw the car approaching, and he was knocked down by it just as he stepped across to the opposite rail. Upon his own statement, therefore, he was guilty of contributory negligence. He says that he crossed "just to be safe," but, as there was nothing else in the street, he would have been perfectly safe in standing still until the car had passed.

The case is pressed upon the ground that the car was coming at great speed, yet this was both seen and the increase of speed noticed by him. If such fact shows the negligence of the defendant, it also shows with equal clearness the plaintiff's contributory negligence. The greater the visible speed, the greater was the carelessness of the plaintiff in trying to cross in front of the car. There was no emergency to confuse him or to require him to cross. He could stop at once. The car could not. He attempted to cross in front of the car, and failed. He deliberately took the chance, and cannot recover from the defendant for the result of his own act, when reasonable prudence would have required him to wait for a second or two until the car had passed.

The rule recently stated in *Poland v. R. Co.*, 26 R. I. 215, 58 Atl. 653, is decisive of this case—where it was held that a child of eight years, who, with an unobstructed view of an approaching car, deliberately crosses in front of it, upon her judgment that she can cross before it reaches her, is guilty of contributory negligence, so as to bar recovery. For stronger reasons should a man be barred of recovery.

Petition for a new trial granted, and case remitted, with direction to enter judgment for the defendant.

STATE ex rel. CRANDALL v. CHICAGO, B. & Q. R. CO.

(Supreme Court of Nebraska, Oct. 20, 1904.)

[101 N. W. Rep. 23.]

Carriers—Duty to Furnish Facilities—Discrimination.*

A common carrier of goods is required to provide facilities for and

*See foot-note appended to *State v. Chicago, etc., R. Co.* (Neb.), 13 R. R. R. 336, 36 Am. & Eng. R. Cas., N. S., 336.

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to receive and ship goods tendered at its stations on payment or tender of the usual tariff rates, and has no right to discriminate or favor one shipper over another in rates or facilities.

Same—Same—Unusual Demand for Cars—Apportionment Among Shippers.*

But this general principle is subject to the modification that, if the carrier has furnished itself with cars sufficient to carry the freight which may reasonably be expected to be offered for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has exercised due diligence in that regard, and where, through causes which are not within its control, it cannot supply the cars temporarily made necessary by unusual demand therefor, it is entitled to apportion the same in a fair and equitable manner among its patrons, and cannot be compelled to provide one shipper with cars to the exclusion of others.

Same—Same—Discrimination—Sufficiency of Evidence.

Under the facts set forth in the opinion, *held*, that no unjust discrimination has been proved, and that the relator is not entitled to the writ of mandamus prayed for.

(Syllabus by the Court.)

Commissioners' Opinion. Error to District Court, Lancaster County; Holmes, Judge.

Application by the state, on the relation of William J. Crandall, for writ of mandamus to the Chicago, Burlington & Quincy Railroad Company. Judgment for defendant, and plaintiff brings error. **Affirmed.**

H. F. Rose, for plaintiff in error.

J. W. Deweese and Frank E. Bishop, for defendant in error.

LETTON, C. This is an application for a peremptory writ of mandamus to compel the respondent to furnish and deliver to relator sufficient freight cars to enable him to ship all grain and mill products offered for shipment at the railroad station of the respondent at Firth, Neb., and to compel the respondent to furnish equal facilities and privileges to the relator in the matter of providing cars for the shipment of grain that are given to his competitor in business, the Farmers' Grain & Lumber Company. William J. Crandall, the relator, now is and has been engaged for a number of years, at the town of Firth, Lancaster county, Neb., in operating a mill and elevator, and of buying, selling, and shipping grain and mill products. A few years ago the Farmers' Grain & Lumber Company was organized by a number of farmers residing in that locality, for the purpose of dealing in grain, and ever since this corporation began business sharp competition has existed between the respective grain dealers. Both of these parties occupy elevators situated upon the line of railroad of the respondent. It appears that in the early part of 1903 a shortage of cars existed on the lines of the respondent, and that it was compelled to apportion the cars available at that time between the grain shippers operating upon its lines of railroad,

See () on page 402.

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and it further appears that during this time the respondent had furnished cars in equal number to the rival grain dealers at Firth for the shipping of grain, upon the theory that as a grain dealer Crandall was entitled to an equal number of cars with the Farmers' Grain & Lumber Company, and, in addition thereto, as a miller he was entitled to whatever cars he could use and the railroad could furnish for the purpose of shipping his mill products; but that, since the mill products for the most part were destined to Southern points, foreign cars were furnished him specially for such shipments. Under this arrangement, Mr. Crandall, from the 1st of December, 1902, to the 12th of February, 1903, had been furnished in all 102 cars, while the Farmers' Grain & Lumber Company had been furnished 47. After the 12th of February, 1903, the railroad agent at Firth, Neb., was instructed by C. B. Rogers, the division superintendent, that after that date the railroad company would furnish Mr. Crandall cars for flour, bran, and straight car loads of corn meal as mill products, and then divide the remainder of the available cars evenly between Crandall and the Farmers' Grain & Lumber Company, and that under this ruling mixed car loads of corn meal, chop, cracked corn, and sack corn would be counted at their capacity as cars loaded with grain.

It would seem that the moving cause of this order was the fact that a complaint had been made by the Farmers' Grain & Lumber Company to the railroad company that Crandall was obtaining more than his share of cars by reason of his shipping chop and cracked corn as mill products when they ought of right to be counted as grain in the division of cars, and thus that the Farmers' Grain & Lumber Company was being unduly discriminated against in the apportionment of cars furnished. Following the making of this order, whenever Crandall shipped a car load of chop or of mixed chop and crack corn or oats the agent at Firth furnished a like capacity of cars to the Farmers' Grain & Lumber Company for the shipment of grain, and out of this order and the action of the agent of the railway company in accordance therewith this controversy takes its rise.

It is apparent from the whole testimony that the officers of the railroad company endeavored to fairly and equitably apportion cars for the shipment of grain between these contending parties. The determination of the question at issue depends almost wholly upon whether the article of commerce which is termed "course meal" or "chop" by Mr. Crandall and is denominated "cracked corn" by the respondent and the Farmers' Grain & Lumber Company, should be considered as grain for the purposes of the apportionment of cars, or should be classed as a mill product. If this article is handled and dealt in by grain dealers and elevator proprietors, and is not known under the custom and usages of the trade as a mill product or meal, then the Farmers' Grain & Lum-

ber Company would be entitled, under the rule adopted by the respondent, which seems to be fair and reasonable, to an equal capacity of freight cars for shipment of grain to those used by Mr. Crandall in the shipment of this product; whereas, if this article falls properly and legitimately under the head of mill products, and is to be considered as a manufactured article, Crandall would be entitled to such cars as the railroad could furnish him to use in his milling business, including the shipment of this product, and, in addition thereto, with as many cars for grain shipments as were furnished to his competitor. A sample of this product taken from a sack in a car loaded by Mr. Crandall was in evidence in the district court, and is attached to the bill of exceptions in this case. A number of witnesses engaged in the elevator and grain-dealing business testified that this article was what is known in the trade as "cracked corn"; that it is manufactured simply by crushing the corn between rollers, and is not cleaned or bolted in any manner, the resulting product being the same as that produced by the ordinary farmers' feed mill; while Crandall testifies that it is properly known as "course corn meal," though admitting that it is so produced. It seems also that in the southwestern tariff sheet a higher rate is charged for corn chop than for corn, and that on respondent's system "chop" is classified as a separate item. It is therefore contended by Crandall that this product is not properly shipped as grain, but as a mill product. Should the "chop," "cracked corn," or "course meal," as it is variously termed, be regarded in the distribution of cars as a grain or as a mill product? This question is not free from doubt. It is shown that a number of elevators in this state which do not do a milling business have had a demand from their customers for cracked corn for feeding purposes, and that to meet this demand they have installed roller machinery for the purpose of cracking the corn, and that the article thus manufactured is handled and sold as other corn by grain dealers. On the other hand, it is shown that Mr. Crandall has installed expensive machinery at his mill for the purpose of manufacturing corn meal. But it is also shown that in the manufacture of corn meal for culinary purposes the corn is first kiln-dried, then cracked or ground between rollers, and afterwards bolted, and that in the manufacture by him of this "course meal" or "cracked corn" the same rollers are used, but they are set farther apart, so as not to crush the grain so finely; that the corn is not kiln-dried, and the product is not bolted. The corn is merely passed between the rollers, and from there loaded into the car. After examining the sample attached to the bill of exceptions, and considering the evidence in the case, we are convinced that this substance properly belongs under the head of "cracked corn" or "chop," and is not in the ordinary acceptance of the term "meal," and we are further convinced from the testimony that under the

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usages of the trade the article is properly handled by grain dealers as well as millers. Taking this view of the facts proved, we are of the opinion that the distribution of cars as made by the respondent was not unfairly discriminative against the relator, but that, in view of all the circumstances, he has no reason to complain upon that ground.

The record shows that considerable ill feeling exists between some of the members of the Farmers' Grain & Lumber Company and Mr. Crandall, and that certain charges and complaints had been made to the railway company that Crandall had been shipping grain under the guise of mill products by covering part of the contents of the car, and thereby obtaining more than his share of cars. We are convinced, however, that these charges are not warranted by the evidence, and that Crandall was honest and sincere in his opinion that as a miller he was entitled to all the cars the railroad could furnish for his use in shipping all kinds of mill products, including therein "cracked corn," and that as a grain dealer he was entitled to an equal number of cars with his competitor, excluding cars used for "cracked corn," "chop," etc. We are further convinced that no intention on the part of the respondent's agents or officers to discriminate unfairly against Mr. Crandall has been shown, and that they have been placed in the difficult position of trying to do business with two active and jealous competitors in such a manner as to remain upon good terms with both, a task almost beyond human power.

"How happy could" they "be with either,
Were t'other dear charmer away!"

The brief of the relator is largely devoted to the proposition that a common carrier of goods is required to provide facilities for and to receive and ship goods tendered at its stations on payment or tender of the usual tariff rates; that it has no right to discriminate or favor one shipper over another in rates or facilities, and that such duties of common carriers are enforceable by mandamus. With this proposition we agree. Since the briefs in this case were filed, the case of State ex rel. McComb v. Chicago, B. & Q. Ry. Co., 99 N. W. 309, has been decided by this court. That decision is in accord with the principles contended for by relator, but with the further qualification that, when the carrier has furnished itself with the appliances necessary to transport the amount of freight which may, in the usual course of events, be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in any given locality temporarily, or at long intervals of time. It appears that ordinarily the respondent has cars enough to meet the usual requirements of shippers, but that, owing to the long

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coal strike in the East, conditions had been abnormal, and the railroad company had at this time been unable to have returned to its line a large number of its cars which had been sent to points upon other railroads, and that it had found it necessary to impose an extra charge in the nature of a per diem for cars which were retained by other lines for more than 30 days, with the purpose of procuring an expeditious return of the cars; that, owing to this scarcity, it was impossible to furnish at this time all the cars necessary for use, not only by the relator, but by all other grain shippers along its lines in this state. Under this state of facts the modifying principle above quoted applies, and, if no unjust discrimination appears, no shipper has the right to complain because he has not been able to obtain carriage for all the goods which he may desire transported.

We are of the opinion that no failure of duty or unjust discrimination has been shown upon the part of respondent, and that the judgment of the district court should be affirmed.

AMES, C., concurs.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

BIBB BROOM CORN CO. v. ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Minnesota, Feb. 24, 1905.)

[102 N. W. Rep. 709.]

Carriers—Duty to Ship Promptly.*

It is the duty of a common carrier to whom goods are delivered for transportation to forward them promptly, and without unreasonable delay, to their destination.

Same—Delay—Act of God—Proximate Cause.*

If he fails to do so, and negligently and carelessly delays the shipment, and the goods are overtaken in transit and damaged by an act of God, which would not have caused the damage had there been no delay, he is liable, even though the act of God could not reasonably have been anticipated. The negligence and unreasonable delay is such a proximate or concurring cause as renders a carrier liable.

Same—Same—Same—Same—Nature of Goods.*

This rule applies whether the goods in their nature are perishable or nonperishable.

(Syllabus by the Court.)

Appeal from Municipal Court of Minneapolis; H. D. Dickinson, Judge.

Action by the Bibb Broom Corn Company against the Atchison, Topeka & Santa Fe Railway Company. Verdict for plaintiff. From an order denying an alternative motion

*See foot-notes appended to *McKenzie v. Michigan Cent. R. Co.* (Mich.), 12 R. R. R. 830, 35 Am. & Eng. R. Cas., N. S., 830; *South-ern Ry. Co. v. Kentucky v. Railey Bros.* (Ky.), 11 R. R. R. 494, 34 Am. & Eng. R. Cas., N. S., 494.

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for judgment notwithstanding the verdict, or for a new trial, defendant appeals. Affirmed.

Belden, Hawley & Jamison, for appellant.

A. W. Selover, for respondent.

BROWN, J. The facts in this case are as follows: On or about May 12, 1903, plaintiff delivered to defendant at Stafford, Kan., a car load of broom corn, to be transported to Minneapolis, this state. The route of transportation was by way of Kansas City, and defendant was to forward the car at that point, the terminus of its line, over the Chicago Great Western Road. The car reached the freightyards of defendant at Kansas City on May 23d, but defendant wholly failed and neglected to send it forward or notify the Chicago Great Western Company of its arrival, though the evidence tends to show that immediately after the arrival of the car at Kansas City defendant sent a messenger to communicate the fact to the Great Western Company, and that it was to be forwarded over its line, but through carelessness the messenger notified the Missouri Pacific Company instead, and the Great Western was not informed of the matter at all. In consequence of the neglect of the messenger, the car remained in the yards of defendant until it was submerged by water in the great flood occurring during the last days of May and the first days of June at Kansas City, and the corn substantially destroyed. After the waters of the flood had receded, defendant, having first offered to forward the car to Minneapolis and plaintiff having refused to accept the corn in its damaged condition, caused the same to be sold, and tendered plaintiff the proceeds, less freight charges. Plaintiff brought this action to recover the value of the corn, alleging in its complaint that it was damaged and injured while in the possession of defendant, through its negligence and carelessness. The delivery of the corn to defendant for transportation, and that it was damaged while in defendant's possession, are admitted in the answer, but it is alleged in defense that the damage was caused by an act of God; that an unusual and extraordinary rainfall occurred at Kansas City and vicinity at the time the car was in its yards, causing the river to overflow its banks and submerge defendant's yards, the occurrence and extent of which could not have been foreseen or anticipated. The trial court instructed the jury in part that, if the corn was destroyed by an act of God, unaccompanied by the concurrent negligence of defendant, plaintiff could not recover; but, in effect, left to the jury to say whether the delay in forwarding the car was negligence, and whether such negligence concurred in causing the damage. The jury returned a verdict for plaintiff, and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

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The only assignments of error requiring consideration are those which challenge the charge of the trial court, in which the jury was instructed that, if the negligent delay of defendant in forwarding the car concurred in causing the injury or loss complained of, defendant was liable. It is contended with much earnestness and ability by defendant's counsel that, notwithstanding there might have been negligent delay in forwarding the car from Kansas City to Minneapolis, but for which the corn would not have been damaged, yet the damage complained of resulted proximately from the flood, an act of God, and that, as plaintiff failed to show that defendant was chargeable with neglect in not foreseeing or guarding against the danger, no recovery can be had. The question presented, then, is whether a common carrier is liable to the owner of goods delivered to him for transportation, which are damaged or destroyed by an act of God while in his possession, in consequence of a negligent delay in forwarding them, whether the act of God could reasonably have been anticipated or not. The question is an important one, and the authorities are not in harmony. We have considered it with care in all its bearings, and reach the conclusion that the carrier is liable.

As a general rule, applicable to all cases of negligence, if damage is caused by the concurrent force of defendant's neglect and some other cause for which he is not responsible, including an act of God, he is nevertheless liable if his negligence is one of the proximate causes of the injury complained of, even though, under the particular circumstances, he was not bound to anticipate the interference of the intervening force which concurred with his own. In the application of this rule, however, the authorities are not agreed. It is held in some states, as applied to common carriers, that a negligent delay in forwarding property delivered to them for transportation, which are injured by an act of God, or other cause for which they are not responsible, and could not reasonably have been anticipated, does not render the carrier liable, although the property would not have been damaged had there been no delay. 1 Am. & Eng. Enc. Law (2d Ed.) 596. Courts holding to this rule place their decisions on the ground that the act of God in such cases is the proximate cause of the injury, and not the delay in transportation. *Herring v. Ry. Co.*, 101 Va. 778, 45 S. E. 322. In other states the opposite doctrine is settled and adhered to. *Shearman & Redfield on Negligence*, § 40. The authorities are not at variance where the property damaged is perishable, or inherently susceptible to damage from climatic influences, as sudden changes in the weather. Changes in the weather are conditions which the carrier is bound to anticipate as likely to occur, and for injuries resulting to perishable goods from such causes the carrier is liable where his negligent delay in forwarding them contributes

to cause the injury. Goods in this class are those likely to be damaged by freezing or from excessive heat. The authorities are at variance, in so far as negligent delay is concerned, only in cases involving property not perishable. The property in the case at bar was of that character, and would not have been damaged but for the flood that submerged the car while in the yards at Kansas City; neither would it have been damaged had defendant forwarded the car to Minneapolis promptly, and without unreasonable delay, as it was required by law to do. So the question is, was the negligent delay of defendant in forwarding the car one of the proximate causes of the damage to the corn, or did such delay concur with the flood in fact causing the damage? It may be conceded, for the purposes of this case, that the flood was an act of God; that it was unprecedented, and beyond the reasonable anticipation of the most prudent residents of the vicinity where it occurred; and, unless we are to hold that the negligent delay did not render defendant liable, the case must be reversed.

One of the first cases reported in the books, so far as our research has extended, wherein the carrier is held liable for negligent delay in transporting goods, not perishable, which were injured in transit by an overpowering cause not reasonably to have been anticipated, is *Michaels v. N. Y. Central Ry. Co.*, 30 N. Y. 564, 86 Am. Dec. 415. In that case there was a delay of several days in forwarding certain dry goods delivered to the defendant for transportation, which were damaged in transit by an act of God—a flood similar to the one in the case at bar. In disposing of the case and the contention of the railway company that it was exempt from liability for the reason that the injury complained of was the result of an act of God, the court said: "When a carrier is intrusted with goods for transportation, and they are injured or lost in transit, the law holds him responsible for the injury. He is only exempted by showing that the injury was caused by an act of God or the public enemy; and to avail himself of such exemption he must show that he was himself free from fault at the time. His act or negligence must not concur or contribute to the injury. If he departs from the line of his duty, and violates his contract, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have caused the injury, he is not protected." That case has been consistently followed and adhered to in New York, and is now the settled law of that state. In *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426, it was held that, if a common carrier unreasonably delays goods received by him for transportation, and they are injured by an act of God in consequence of such delay, he must show, to exempt himself from liability, that the delay did not contribute to or concur in the injury. In *Condict v. Ry. Co.*, 54 N. Y. 500, it was said that it is the

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duty of a common carrier to forward goods delivered to him for transportation promptly, and within a reasonable time, and, if a loss occurs in which his negligence in part concurs, he is liable. See, also, *Dunson v. Ry. Co.*, 3 Lans. (N. Y.) 265. This doctrine has been followed and applied in other states. In *Wolf v. Express Co.*, 43 Mo. 421, 97 Am. Dec. 406, the court laid down the general rule in such cases in the following language: "The act of God which will excuse a carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause; and, where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, he is still liable." In *Wald v. Ry. Co.*, 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332, it appeared that plaintiff had purchased of defendant a ticket entitling him to passage from Chicago to New York upon one of its trains known as the "Limited Express." He was also entitled, as a matter of law, to have his baggage, which was checked at the time he procured his ticket, forwarded by the same train. The baggage was, however, by the negligence of the baggageman, forwarded from some point on the line by the day express, a train following the "Limited Express" a number of hours later. Plaintiff reached his destination in safety, but the day express which carried his baggage was overtaken by a flood at Johnstown, Pa.—an act of God—and the baggage destroyed. The court held the defendant liable, saying in the opinion that the unnecessary delay of a carrier which subjects goods in his possession to loss by an act of God, which they would not otherwise have met with, is in itself such negligence as will render him liable. In *Louisville, etc., Ry. Co. v. Gidley*, 119 Ala. 523, 24 South. 753, it appeared that defendant delivered to plaintiff, a common carrier, at Gadsden, Ala., goods to be transported to Philadelphia. The carrier unnecessarily delayed forwarding them for some days, and they were in the meantime destroyed by a fire, for which plaintiff was in no way responsible, and for which it could not, under its contract, have been made liable to the owner of the goods. The court held that the unnecessary delay in shipment was the proximate cause of the loss, and that the carrier was liable. This rule of liability is followed in Kentucky. *Cassilay v. Young & Co.*, 4 B. Mon. 265, 39 Am. Dec. 505; *Hernsheim v. Ry. Co.* (Ky.) 35 S. W. 115. Also in Maryland. *Baltimore & O. Ry. Co. v. Keedy*, 75 Md. 320, 23 Atl. 643. The foregoing cases all involve property not perishable, and the negligent delay was held either the proximate cause of the loss, or that it concurred with the act of God in causing the damage and rendered the carrier liable. Other cases, more or less in point, may be found collected in 36 Am. St. Rep. 839. See, also, *Deming v. Ry. Co.*, 48 N. H. 455, 2 Am. Rep. 267; *Ry. Co. v. Curtis*, 80 Ill. 324; *Campbell v. Morse*, Harp. (S. C.) 468;

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Meyer v. Ry. Co., 41 La. Ann. 639, 6 South. 218, 17 Am. St. Rep. 408; *Missouri, K. & T. Ry. Co. v. McFadden*, 89 Tex. 138, 33 S. W. 853; *Pruitt v. Ry. Co.*, 62 Mo. 527. And the rule was, in effect, laid down, though the precise question here under consideration was not there involved, in *Jones v. Mpls. & St. Louis Ry. Co.*, 91 Minn. 229, 97 N. W. 893.

We have examined the authorities holding the opposite of this doctrine, and, while the courts adhering to the same are of eminent standing, we have no difficulty in adopting the view of the cases above cited. The rule that permits a carrier to excuse his negligence by an act of God overtaking him while thus in fault seems to us unsound. It is based on too strict an application of the rule of proximate cause. It is the duty of a common carrier to whom goods are delivered for transportation promptly and without unreasonable delay to forward them to their destination, and such was defendant's duty in the case at bar. This it failed to do, and its negligence in this respect is not seriously controverted. The car arrived at its yards in Kansas City on the 23d of May, and was permitted to remain there without proper effort to forward it until it was overtaken by the flood. It could have been moved from defendant's yards on any day after its arrival prior to the 29th of May, and, had this been done, the corn would not have been damaged. If defendant had acted as required by the terms of its contract, and as enjoined by law, the car would have been forwarded, and would have arrived at its destination prior to the flood. That defendant's neglect concurred and mingled with the act of God seems the only reasonable conclusion the facts will warrant, and we feel safe in applying the general rule that an act of God is not in such cases a defense. Every reason in equity and justice relieves a carrier from the performance of his contract and from liability for injuries to property in his custody for transportation, resulting exclusively from an act of God, or other inevitable accident or cause over which he has no control, and could not reasonably anticipate or guard against. But reasons of that nature lose their force and persuasive powers when applied to a carrier who violates his contract, and by his unreasonable delay and procrastination is overtaken by an overpowering cause, even though of a nature not reasonably to be anticipated or foreseen. If, but for his negligence, the loss would not have occurred, no sound reason will excuse him, and he should not be relieved by an application of the abstract principles of the law of proximate cause. No wrongdoer should be allowed to apportion or qualify his own wrong; and, if a loss occurs while his wrongful act is in operation and force, and which is attributable thereto, he should be held liable. *Davis v. Garrett*, 6 Bing. 716.

Our conclusions are that the trial court correctly instructed the jury, that the record presents no reversible errors, and the order appealed from is affirmed.

O'BRIEN v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1, Dec. 22, 1904.)

[84 S. W. Rep. 939.]

Carriage of Passengers—Degree of Care.*

A carrier is bound to exercise the greatest care consistent with the practicable operation of its cars toward a passenger, not only while he is on the car, but also until he has alighted in safety.

Death of Passenger—Willful Acts of Employees—Question for Jury.

In an action against the carrier for death of a passenger on a street car, under Rev. St. 1899, § 2864, authorizing recovery where the passenger shall die from an injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any servant or employee while running any public conveyance, etc., evidence held sufficient to require submission of defendant's liability to the jury.

Same—Fight with Conductor—Liability.†

In an action against a carrier for death of a passenger, an instruction that if deceased, just before alighting from the car, called the conductor vile names, and struck him, and the conductor, in resenting the insult and repelling the assault, struck deceased, and deceased dragged the conductor from the car, and was shot in a fight which ensued on the ground away from the car, from which shooting deceased died, plaintiff was not entitled to recover, was proper.

Same—Same—Instruction.†

An instruction that if deceased cursed defendant's street car conductor while deceased was alighting from the car, and at that time the conductor had not struck deceased nor cursed him, such conduct constituted a breach of the peace; and if the conductor, in resenting such insult, engaged in a fight with deceased on the street, in the course of which deceased was shot, plaintiff was not entitled to recover from defendant—was error, as eliminating as immaterial whether the conductor was dragged from the car, as defendant's evidence tended to prove, or voluntarily followed deceased to the sidewalk, and there attempted to preserve the peace, according to plaintiff's evidence.

Same—Same—Liability.†

In an action against a carrier for death of a passenger caused by an altercation with the conductor, an instruction that if deceased struck the conductor before the latter had made any assault upon him, and a fight ensued on the street, off the car, during which the conductor shot and killed deceased, defendant was not liable, was erroneous; for if, after striking the conductor, deceased attempted to get off the car, and the conductor held and beat him, and then followed him off the car, and killed him, the carrier would be liable.

Same—Same—Same—Evidence—Instruction.†

In an action for death of a passenger from injuries received in an altercation with the conductor there was evidence that, after deceased

*As to the degree of care required of a carrier of passengers, see *Magrane v. St. Louis & S. Ry. Co. (Mo.)*, 13 R. R. R. 1, 36 Am. & Eng. R. Cas., N. S., 1; *Johnson v. Seattle Elec. Co. (Wash.)*, 12 R. R. R. 786, 35 Am. & Eng. R. Cas., N. S., 786; *Fitch v. Mason City & C. L. Traction Co. (Iowa)*, 12 R. R. R. 451, 35 Am. & Eng. R. Cas., N. S., 451; *Logan v. Metropolitan St. Ry. Co. (Mo.)*, 12 R. R. R. 753, 35 Am. & Eng. R. Cas., N. S., 753; *St. Louis Southwestern Ry. Co. of Texas v. Parks (Tex.)*, 11 R. R. R. 688, 34 Am. & Eng. R. Cas., N. S., 688.

†See foot-note appended to *Birmingham Ry. Light & Power Co. v. Mullen (Ala.)*, 10 R. R. R. 265, 33 Am. & Eng. R. Cas., N. S., 265.

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struck the conductor, the latter began "defending himself" by beating deceased with the butt end of a pistol as he was leaving the car, and followed him, still beating him, to the sidewalk. Defendant's evidence showed that the conductor was first assaulted by deceased, and then dragged off the car by him: *held*, that an instruction that if deceased assaulted the conductor as he was alighting, the conductor was justified in defending himself, and if he did defend himself from such assault, and while so doing there was a fight on the street, off the car, between the deceased and the conductor, in which deceased was shot, plaintiff could not recover, should not have been given.

Same—Same—Self-Defense—Liability.†

An instruction that if deceased pulled the conductor off a street car the latter was entitled to strike deceased in resistance thereof, and if deceased succeeded in pulling the conductor from the car, and then engaged in a physical conflict with him, the conductor was entitled to resist any assault that deceased made on him, and, even if the conductor did more than was necessary to resist such assault and in doing so shot deceased, the carrier was not liable for its conductor's conduct, was proper.

Same—Same—Liability.†

An instruction that, though the conductor voluntarily followed deceased from the car, and thereafter engaged in a physical conflict with him, and as a result thereof deceased was shot by the conductor, yet such voluntary act of the conductor was no part of his duty as conductor, and defendant was not liable for the consequences thereof, was erroneous.

Appeal from Circuit Court, St. Louis County; Jno. W. McElhinney, Judge.

Action by Kathrynne O'Brien against the St. Louis Transit Company. From an order granting plaintiff a new trial, defendant appeals. Affirmed.

Boyle, Priest & Lehmann and Geo. W. Easley, for appellant.

A. R. Taylor, for respondent.

VALLIANT, J. Plaintiff is the widow of Michael O'Brien, who was killed by a conductor of one of defendant's street cars, as the petition charges, "whilst in charge of its said car as driver and controller, negligently, and with criminal intent." The suit is founded on section 2864, Rev. St. 1899.

The plaintiff's evidence tended to prove as follows: Michael O'Brien, plaintiff's husband, was a passenger on one of defendant's street cars. His destination was Twelfth and Herbert streets. On approaching that crossing he signaled the conductor to stop there, but the car passed Twelfth street, and went on to Thirteenth, and there stopped for him to alight. O'Brien was provoked at being carried past his stopping place, and spoke angrily to the conductor about it, and a quarrel of words between them ensued. During the quarrel O'Brien was getting off the platform of the car backwards, facing the conductor, who was striking him, or striking at him, with the butt end of a pistol he held in

†See (†) on page 413.

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his hand. When O'Brien stepped down from the platform the conductor followed him to the sidewalk, holding to him, and beating him with the pistol. Arriving on the sidewalk, the two men clinched. O'Brien got behind the conductor, and threw his arms around him, holding his (the conductor's) arms down by his side, and in the struggle the conductor pointed his pistol around, and fired, inflicting a wound from which O'Brien died two days later.

The testimony on the part of defendant tended to prove as follows: When O'Brien asked the conductor to stop at Twelfth street the conductor said he would give the signal, but that he did not think the motorman would or could stop there because of the condition of the street. He gave the signal, but the car did not stop until it got to Thirteenth street. O'Brien became angry at being carried past Twelfth street, and used abusive language to the conductor, and, passing the conductor on the rear platform, struck him a blow on the side of the head, then grabbed him by the lapel of his coat, and dragged him off the car, and struck at him twice, but missed him. The conductor reached into his pocket and got his pistol. When he drew it out he had a handkerchief fastened around it, and he struck at O'Brien two or three times, holding it by the barrel. Some one at that time came up behind the conductor, and he turned around, and as he did so O'Brien seized him from behind, and pinned his arms down to his side, and in that way they scuffled and fell, and in the fall the pistol was discharged.

Under the conflict in evidence as shown in the above statement, the jury, if properly instructed, would have been justified in returning a verdict for the plaintiff if they believed her witnesses in preference to those of the defendant, and they would have been justified in finding for the defendant if they believed its witnesses in preference to those of the plaintiff. The verdict was for the defendant, but the court sustained the plaintiff's motion for a new trial on the ground that it had erred in the instructions given at the request of the defendant. The questions on this appeal relate entirely to the instructions so given.

Appellant takes the position that, as this killing occurred on the sidewalk, the conductor was beyond the field in which his act as servant was chargeable to the master, and for that reason the plaintiff, on her own evidence, was not entitled to go to the country. We have now to look not only to the law of master and servant, but also to that of carrier and passenger. It is the duty of the carrier not only to exercise care to carry the passenger safely to his destination, but also to afford him opportunity to alight in safety. In Thompson on Neg. vol. 3, § 3518, it is said: "At the outset it is to be remembered that the person attempting to alight from the carrier's vehicle is still a passenger until he has accomplished the act of alighting in safety, and that the street car com-

pany is a carrier of passengers, and owes to the passenger attempting to alight that very high degree of care and attention which the law puts upon it generally, to the end of promoting the safety of its passengers. The degree of care required under these circumstances has been described as the greatest care consistent with the practicable operation of its cars." While the passenger is in the carrier's vehicle he is entitled to protection from assault, even from strangers, if, by the exercise of the degree of care devolving on the carrier, it can be afforded; and, a fortiori, the carrier owes it to his passenger not to maltreat him by the hands of its own servants. Hutchinson on Carriers, §§ 595, 596. Quoting again from Thompson on Negligence, vol. 3, §§ 3185, 3186, the author says that the law implies not only an agreement to carry safely, "but also an agreement for kind, considerate, respectful, and decorous treatment to the passenger at the hands of the carrier's own servants. * * * The carrier is liable absolutely, as an insurer, for the protection of the passenger against assaults and insults at the hands of its own servants, because the contracts to carry the passenger safely and give him decent treatment en route." If it be conceded, therefore, that under the law of master and servant the conductor was outside of the field of his employment when he followed (if he did so) this man to the sidewalk and assaulted him, still, under the law of carrier and passenger, the man was under the care and entitled to the protection of the carrier not only while he was in the car, but while he was alighting, and until the act of alighting had been entirely accomplished. Whilst it is true a conductor is not employed to follow passengers out to the sidewalk and beat or shoot them, yet they are employed to protect them from assault while they are leaving the car, and to see that they alight in safety. If a stranger on the car had done to this man what the evidence for plaintiff tends to show the conductor did, and if the conductor could have prevented the wrong by the exercise of a very high degree of care, and failed to do so, the defendant would have been liable. With what stronger reason, therefore, is the defendant liable when the conductor himself is the offender. But, whilst care on the part of the carrier for the safety and kind treatment of the passenger are required, yet so, also, are required care on the part of the passenger for his own safety and decent behavior. If the passenger assaults the conductor, the latter has a right to defend himself; and if in a personal combat between the passenger and the conductor, brought on by the passenger's wrongful assault, the latter is injured, the carrier is not liable. If, as the defendant's evidence tended to prove, O'Brien struck the conductor, and then seized him, and dragged him off the car to the sidewalk, it was then an affair between man and man, and the defendant was not liable for what happened on the sidewalk. It was a fair case,

under the evidence, for the jury, if the instructions had been right.

The following are the only instructions criticised:

"(2) The court instructs the jury that if they believe from the evidence that plaintiff's husband, just before alighting from said car at Thirteenth and Herbert, called the conductor thereof vile names, and struck said conductor, and that said conductor, in resenting said insult and repelling said assault, then struck plaintiff's husband, and that he dragged said conductor from said car, and that a fight then ensued on the ground, off of said car, between him and said conductor, in which said plaintiff's husband was shot, and that as a result of said shooting he died, then said plaintiff is not entitled to recover, and your verdict must be for the defendant.

"(3) The court instructs the jury that if they believe from the evidence that plaintiff's husband cursed the conductor on said car, and called him vile names, while in the act of alighting from said car, and that at that time said conductor had neither struck plaintiff's said husband nor cursed him, such conduct on the part of said plaintiff's husband was disorderly, and constituted a breach of the peace; and if they further believe from said evidence that said conductor, in resenting said insult, engaged in a fight with said plaintiff's husband on the street off of said car, but not upon said car, in the course of which said plaintiff's husband was shot and that he died from said injuries, then said plaintiff is not entitled to recover, and your verdict must be for the defendant.

"(4) If you find from the evidence in this case that plaintiff's husband struck the defendant's conductor before said conductor had made any assault whatever upon him, and if you further believe from the evidence that said plaintiff's husband and said conductor then engaged in a fight on the street, off said car, in the course of which said plaintiff's husband was shot, and although you find that said plaintiff's husband died as a result of said injury, the plaintiff is not entitled to recover, and your verdict must be for the defendant.

"(5) The court instructs the jury that if, from the evidence, they believe that plaintiff's husband assaulted the conductor of said car as he was alighting therefrom, said conductor was justified in defending himself; and should they further believe from the evidence that said conductor did defend himself from said assault, should they find there was one, and that while so defending himself there was a fight on the street off of said car between plaintiff's husband and said conductor, in which said plaintiff's husband was shot, and that as a result of said shooting he died, then said plaintiff is not entitled to recover.

"(6) If the jury believe from the evidence that the de-

ceased seized the conductor, and pulled him off the car, then the conductor had a right to strike the deceased for the purpose of resisting being pulled from the car, and if the jury further believe that deceased succeeded in pulling the conductor from the car, and then engaged in a physical conflict with him, then the conductor had a right to resist any assault that deceased made on him; and, even if the jury believe that the conductor did more than was necessary to resist such assault, in doing so shot deceased, yet the defendant is not liable for the conduct of such conductor, and the verdict must be for defendant.

“(7) Although the jury believe from the evidence that the conductor voluntarily followed the deceased off the car, and there, and not upon said car, got into a physical conflict with him, and as a result of such conflict deceased was shot by the conductor, as alleged, yet such voluntary act of the conductor in getting off said car, and voluntarily engaging in a conflict with deceased, and voluntarily shooting him, was no part of his duty as conductor, and defendant is not liable for the consequences of such shot, and the verdict must be for defendant.”

From the principles above laid down we conclude that there was no error in instruction No. 2. It supposes the case in which the plaintiff's husband was the assailant, and, instead of being interfered with in leaving the car, he dragged the conductor to the sidewalk, and the combat there was the natural result of his own conduct.

Instruction 3 is erroneous. It supposes the case of the passenger's disorderly conduct while in the act of alighting in cursing and calling the conductor a vile name, thereby causing a breach of the peace, and the conductor, resenting the insult, engaged in a fight with him on the street, off the car, in which fight the passenger was shot. The writer of that instruction had in mind the authority of the conductor to preserve the peace. A conductor is charged, for the protection of his passengers, with the duty of preserving the peace on the car of which he is in control. But in this instruction the duty of the conductor to preserve the peace in the interest of his passengers is merged in his own right to resent an insult. The instruction drops out of view, as if it were immaterial, the question of whether the conductor was dragged off the car, as defendant's evidence tended to prove, or voluntarily followed the plaintiff's husband to the sidewalk, and there undertook to preserve the peace. It would be an extraordinary case (of which no example now occurs to us) that would justify a conductor, in his capacity as a preserver of the peace, to follow the offender to the sidewalk. And even in suppressing violent conduct to preserve the peace the question of whether unnecessary force was used should be considered, and that question was omitted in the third instruction.

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The fourth instruction is to the effect that, if O'Brien struck the conductor before the latter had made any assault on him, and a fight ensued on the street, off the car, during which the conductor shot and killed O'Brien, the defendant is not liable. Suppose it had all happened on the car; suppose O'Brien struck the conductor, and a fight ensued, and in the course of the fight the conductor drew his pistol, and shot him—can we say with those facts, and nothing more, that the company was not liable? The law does not degrade the manhood of a conductor. He is entitled to resent an insult or an assault; but an insult or a blow does not, under all circumstances, justify the killing of the assailant. Even if the slayer was answering to an indictment in such case, he would have to show something more than that he had been insulted or struck, in order to be entirely acquitted. But here we are supposing a man who, although, it may be, was misbehaving, yet still was, in a measure, under the care and protection of this conductor, who was then and there *pro hac vice* the carrier itself. Can it be said that because the man was abusive in his language, and struck the conductor, the latter had the right to shoot him down? If the company would be liable under those facts if the killing occurred on the car, then it might or might not, according to circumstances, be liable if the killing occurred off the car. If, after striking the conductor, the deceased seized him, and pulled him off the car to the sidewalk, and the fight there ensued, the defendant would not be liable. But if, after striking the conductor, the man was trying to get off the car, and the conductor was holding him, and beating him, and thus followed him to the sidewalk, and killed him, the company would be liable. Instruction 4 therefore was erroneous.

The fifth instruction leaves out of view the question of whether the conductor, after being struck by the deceased, began "defending himself" by beating him with the butt end of his pistol as he was leaving the car, and followed him, still beating him, to the sidewalk, as the plaintiff's evidence tends to prove, or was first assaulted and then dragged off the car by the plaintiff's husband, as the defendant's evidence tended to prove. Under this instruction, if the plaintiff's husband struck the conductor before leaving the car, then, as a matter of personal defense, the conductor had a right to follow the deceased off the car, beating him with his pistol, until they reached the sidewalk, and then killed him, without involving the defendant in liability for his act. That instruction should not have been given.

From what has already been said, it was not error to give the sixth instruction, but it was error to give the seventh.

The learned judge decided correctly in sustaining the motion for a new trial on account of errors in the instructions.

The judgment is affirmed. All concur, except ROBINSON, J., absent.

LEWARK et al. v. NORFOLK & S. R. CO.

(Supreme Court of North Carolina, Feb. 21, 1905.)

[49 S. E. Rep. 882.]

Carriers—Loss of Goods—Measure of Damages.*

In an action against a carrier for loss of a consignment of ice shipped by plaintiffs to themselves, plaintiffs were not entitled to recover for the loss of fish, for the packing of which they intended to use the ice, in the absence of any evidence that the carrier knew or should have known that the ice was intended for that purpose; the damages being limited to the value of the ice at destination at the time it should have arrived.

Appeal from Superior Court, Currituck County; E. B. Jones, Judge.

Action by H Lewark and others against the Norfolk & Southern Railroad Company. From a judgment in favor of plaintiffs for less than the relief demanded, they appeal. Affirmed.

E. F. Aydlott, for appellants.

Pruden & Pruden, for appellee.

BROWN, J. On November 14, 1902, the plaintiffs had shipped from Norfolk, Va., to themselves, at Church Island, N. C., two tons of ice, over the defendant's line. The ice was never delivered, although, by due course, it should have reached Church Island the same day it was shipped. It was admitted the plaintiffs were dealers in fish, and desired the ice for their own use. The sole exception in the record presents the question as to the measure of damages. His honor in the court below charged the jury that the

*As to what damages are recoverable for loss of, or injury to, or delay in delivering freight, see foot-note appended to *Louisville & C. Packet Co. v. Bottorff* (Ky.), 13 R. R. R. 263, 36 Am. & Eng. R. Cas., N. S., 263; *Ryland & Ranking v. Chesapeake O. Ry. Co.* (W. Va.), 13 R. R. R. 279, 36 Am. & Eng. R. Cas., N. S., 279 (delay in delivering freight); *Outland v. Seaboard A. L. Ry. Co.* (N. Car.), 10 R. R. R. 476, 33 Am. & Eng. R. Cas., N. S., 476 (measure of damages for breach of contract to furnish cars for freight); *Nelson v. Great Northern Ry. Co.* (Mont.), 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311 (instruction authorizing recovery of expenses for feeding rendered necessary by condition of sheep at place of delivery was erroneous as allowing double damages); *Cleveland, etc., R. Co. v. Patton* (Ill.), 9 R. R. R. 336, 32 Am. & Eng. R. Cas., N. S., 336, (measure of damages for injuries to stock in transit); *Louisville & N. R. Co. v. Hull* (Ky.), 3 R. R. R. 56, 26 Am. & Eng. R. Cas., N. S., 56 (excessive verdict for delay in shipment of corpse); *Southern Ry. Co. v. Horner* (Ga.), 3 R. R. R. 47, 26 Am. & Eng. R. Cas., N. S., 47 (interest cannot be recovered in actions ex delicto); *Gulf, C. & S. F. Ry. Co. v. Houghton* (Tex.), 3 R. R. R. 697, 26 Am. & Eng. R. Cas., N. S., 697 (measure of damages recoverable against connecting carriers for improper treatment of cattle); note, 19 Am. & Eng. R. Cas., N. S., 627 (interest); *St. Louis S. W. R. Co. v. Smith* (Tex.), 2 Am. & Eng. R. Cas., N. S., 531; *St. Louis, etc., Ry. Co. v. De Shong* (Ark.), 6 Am. & Eng. R. Cas., N. S., 773 (measure of damages for injuries to live stock in transit).

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measure of damages was the value of the ice at Church Island on November 14, 1902. To this instruction the plaintiffs excepted. We find no error in the instruction. The general rule for the measure of damage is tersely stated in *Ashe v. De Rosset*, 50 N. C. 299, 72 Am. Dec. 552: "When one violates his contract, he is liable only for such damages as are caused by the breach, or such, as being incidental to the act of omission or commission, as the natural consequences thereof may reasonably be presumed to have been in the contemplation of the parties when the contract was made." In the well-known case of *Hadley v. Baxendale*, 9 Exc. 341, the plaintiff sought to recover damages which grew out of the special circumstances under which the contract was made, i. e., the stopping of plaintiff's mill in consequence of the non-delivery of a shaft which was necessary to, and was ordered for, its operation. This was refused, and the court says in respect to it: "If the special circumstances under which the contract was made were communicated to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract in the special circumstances so known and communicated. But on the other hand, if these special circumstances were unknown to the party breaking the contract, he, at most, could only be supposed to have had in contemplation the amount of injury which would arise generally and in the great number of cases, not affected by any special circumstances, from such a breach of contract." See, also, *Boyle v. Reader*, 23 N. C. 607; *Foard v. Railroad*, 53 N. C. 235, 78 Am. Dec. 277. The plaintiffs' contention is that the measure of damage is the loss on fish. Such damages are too remote, and could not have reasonably been within contemplation of the defendant company when it accepted the ice for shipment. "If every one were answerable for all the consequences of his acts, no one could tell what were his liabilities at any moment." 3 *Parsons on Cont.* (5th Ed.) 179. "Every defendant shall be liable for those consequences which might have been foreseen and accepted as the result of his conduct, and not for those he could not have foreseen, and therefore was under no moral obligation to take into his consideration." *Id.* 5. When the defendant accepted the ice at Norfolk for shipment, it could not foresee that the plaintiffs' fish would be spoiled, or that the ice could be used for packing fish. The defendant did not know that plaintiffs had any fish at the time the ice was shipped, nor is there any evidence that defendant knew it at any time. If the plaintiffs had shown by evidence that the defendant knew or should have known, from facts and circumstances connected with the shipment, or otherwise, that the ice was intended by the plaintiffs for packing

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fish, the plaintiffs would have brought their case within the exception to the general rule. We have examined the evidence with care, and fail to find any which could reasonably bring to the defendant's knowledge the fact that the shipment was other than an ordinary shipment. It had no knowledge of the special purpose. *Neal v. Hardware Co.*, 122 N. C. 105, 29 S. E. 96, 65 Am. St. Rep. 697, pressed upon our attention by the plaintiffs' counsel in his brief and oral argument, differs materially from the case at bar. Tobacco flues are different commodities. Ice is something of general, every day use all the year round, and required for many different purposes. Persons living in localities where tobacco is cultivated are presumed to know what a tobacco flue is intended for, and that, if tobacco is not cured promptly when cut, serious loss will result. In *Sledge v. Reid*, 73 N. C. 440, Mr. Justice Bynum says: "The loss of the crop, though following the loss of the mule, was neither a necessary nor natural consequence. * * * The value of the mule taken, and the hire of another, is the measure of the plaintiff's damage. Anything beyond this would be too remote and conjectural, and would lead the courts into a boundless field of investigation." See, also, *Wood's Mayne on Damages*, §§ 26, 40. It is useless to multiply authorities, as the measure of damages in contracts for the sale or delivery of personal property has been discussed in many cases in the recent Reports of this court, and we find nothing in any of them to support the plaintiffs' contention.

The judgment of the superior court is affirmed.

CONNOR, J., concurs in result.

ATCHISON, T. & S. F. RY. CO. v. CANTON MILLING CO.

(Supreme Court of Kansas, Feb. 11, 1905.)

[79 Pac. Rep. 656.]

Carriers—Transportation of Grain—Shortage.*

Section 7 of chapter 100, p. 176, Laws of 1893, providing that no defense to an action against a railway company for the recovery of

*As to the right of a railroad company to limit its liability for loss of, or injury to, freight to its own line, see *Hartley v. St. Louis K. & N. W. R. Co.* (Iowa), 1 R. R. R. 569, 24 Am. & Eng. R. Cas., N. S., 569; *Fremont, E. & M. V. R. Co. v. New York, C. & St. L. R. Co.* (Neb.), 5 R. R. R. 470, 28 Am. & Eng. R. Cas., N. S., 470; footnote appended to *Pittsburg, C., C. & St. L. R. Co. v. Viera* (Ky.), 3 R. R. R. 62, 26 Am. & Eng. R. Cas., N. S., 62; notes, 20 Am. & Eng. R. Cas., N. S., 720; 13 Am. & Eng. R. Cas., N. S., 194; 11 Am. & Eng. R. Cas., N. S., 586; *Page v. Chicago, St. Paul, etc., R. Co.*, (S. Dak.), 2 Am. & Eng. R. Cas., N. S., 622; *Keller v. Baltimore, etc., R. Co.* (Pa.), 4 Am. & Eng. R. Cas., N. S., 263; *Courteen v. Kanawha Dispatch* (Wia.), 21 Am. & Eng. R. Cas., N. S., 425; *Missouri, K. & T. Ry. Co. v. Bowles* (Ind. Terr.), 8 Am. & Eng. R. Cas., N. S., 12; *Louisville & N. R. Co. v. Tarter* (Ky.), 7 Am. & Eng. R. Cas., N. S., 607.

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loss or shortage on grain received by it for transportation, by reason of the same having occurred on the line of some other company to which it may have been transferred, or which may have received it for shipment, shall be admitted to be made, unless all the facts and circumstances of such loss or shortage so occurring on such other line shall be fully set forth in written pleadings filed by the shipping company, and affirmatively and fully proved by it, has no application to cases against the initial carrier growing out of shipments of grain made under contracts with it signed by the shipper, in which the carrier's liability is limited to transportation to the end of its own line, and delivery there to connecting carriers.

(Syllabus by the Court.)

Error from District Court, Shawnee County; Z. T. Hazen, Judge.

Action by the Canton Milling Company against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. A. Hurd and O. J. Wood, for plaintiff in error.
Sherman & Fletcher, for defendant in error.

BURCH, J. In this case the parties agree upon the facts. The plaintiff delivered to the defendant consignments of bulk wheat for shipment to points beyond the defendant's line of railroad, under contracts signed by the shipper, each containing the following stipulation: "The Atchison, Topeka & Santa Fe Railway Co. * * * Will receive the under noted property and transport it over the Atchison, Topeka & Santa Fe Railway and deliver to consignees or the next company or carriers (if the same is going beyond its line of road), for them to deliver to the place of destination of said property; it being distinctly understood that this company shall not be responsible as common carriers for said property beyond its line of road or while at any of its stations awaiting delivery to such carriers." The defendant safely and promptly transported the property to termini of its own line, and there delivered all of it to connecting carriers, organized, managed, operated, and controlled separate and distinct from itself, for transportation to the places of final destination. At those places portions only of each consignment were delivered by the connecting carriers, and this controversy relates to the liability of the defendant for the shortage.

The plaintiff invokes the aid of chapter 100, p. 176, Laws of 1893, designed, according to its title, for the protection of shippers of grain, seeds, and hay, section 7 of which is as follows: "No defense to an action for the recovery of such loss or shortage on grain, seeds or hay so weighed, by reason of the same having occurred on the line of some other company, to which it may have been transferred or which may have received it for shipment, shall be admitted to be made unless all the facts and circumstances of such loss or shortage so occurring on such other line shall be fully set forth in

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written pleadings filed by the shipping company, and affirmatively and fully proved by it." The defendant pleaded, and the agreed facts show, that it had no knowledge of the manner in which the wheat was handled by the connecting carriers after delivery to them, or, if there was a loss, its extent, or the time when it occurred, or any of the circumstances connected with it.

From the facts as thus presented by the record, three questions of law arise: First. Is section 7 of chapter 100, Laws of 1903, of any validity, in view of the decision of this court in *Railway Co. v. Simonson*, 64 Kan. 802, 68 Pac. 653? Second. If section 7 of the statute referred to be in force, did the pleading and proof on the part of the railway company amount to a substantial compliance with it? Third. Does section 7 of the statute referred to apply to cases growing out of shipments made under contracts of the character of those involved in this suit? If the last question be answered in the negative, a decision of the others would be obiter.

The authorities are unanimous to the effect that a carrier of goods may limit its contract of carriage to transportation to the end of its own line, and delivery there to a connecting carrier. Such was the full extent of the defendant's obligation under its contracts with the plaintiff. In the case of *Berg v. A., T. & S. F. Ry. Co.*, 30 Kan. 561, 2 Pac. 639, a contract of carriage in terms practically identical with those under consideration was interpreted by this court. In the opinion, Mr. Justice Brewer said: "Now, nothing could be clearer than that the company stipulated only for safe transportation over its own road, and a delivery in good order to the connecting carrier." More than this a carrier cannot be compelled to do, if it choose to abide within its privilege. "It is the duty of a common carrier to receive and transport goods over its own line * * * a duty which it must reform, or respond in damages. But it is not its duty to transport such goods over the line of any other carrier, or to contract for such transportation, and it cannot be compelled to assume such an obligation." *Berg v. A., T. & S. F. Ry. Co.*, supra. If the statute invoked by the plaintiff be construed to apply to this case, the defendant must meet, in direct opposition to the terms of its contracts, all the responsibility of a common carrier over lines not its own, unless it plead and prove all the facts and circumstances of divers breaches of duty by other carriers upon their roads. Such an obligation is as foreign to the defendant's contracts as transportation itself over the lines of other carriers would be. It is no part of the business of the defendant, as a common carrier over its own road, to discover, report, and prove the facts concerning negligent acts in the transportation of freight committed by distinct and independent carriers upon their lines. The obligation to do so cannot be superadded to the defendant's contracts to transport over its own route,

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any more than the obligation to carry over other railroads could be superadded to the same contract; and the liability of a carrier over roads other than its own cannot be imposed upon the defendant as a penalty for a failure to perform acts equally alien to its duty. This being true, the statute must be held to be inapplicable to cases of the kind now under review, and it must be held that the defendant was completely exonerated when its contracts, and full compliance with their terms, were established.

The judgment of the district court in favor of the plaintiff is reversed, and, since an agreement with respect to the facts appears, the district court is directed to enter judgment in favor of the defendant for costs. All the Justices concurring.

BATTLE v. COLUMBIA, N. & L. R. R.

(Supreme Court of South Carolina, Dec. 3, 1904.)

[49 S. E. Rep. 849.]

Loss of Wife's Baggage—Action by Husband—Evidence.

Where a husband sues a carrier for the loss of his wife's trunk while a passenger, the husband may testify as to the value after the wife has testified as to the contents.

Loss of Baggage—Money and Jewelry—Liability of Carrier.*

A carrier is liable for money necessary for traveling expenses, and jewelry for personal use, carried as baggage in a trunk.

Baggage—Delivery to Carrier.

Where the trunk of a passenger is delivered to the only person in charge of the station, who is at the time engaged at a telegraph instrument, by depositing it at the place indicated by him, and giving him at the time directions as to checking, and notice that the owner would soon appear, and that he would attend to it, it is a delivery to the carrier.

Parties.

Defect of parties can be taken advantage of only by demurrer or answer.

Loss of Wife's Baggage—Husband's Right of Action—Absence of Negligence.†

The husband has title to the wearing apparel of his wife and children, and other articles convenient to their personal use, so that he may maintain an action for the loss of them in a trunk in the possession of his wife, delivered to a carrier as the baggage of his wife, though no evidence of negligence on the part of the carrier is shown.

Gary, A. J., and Woods and Jones, JJ., dissenting in part.

Appeal from Common Pleas Circuit Court of Laurens County; Dantzler, Judge.

*As to what constitutes passenger's baggage, see foot-note appended to *Yazoo & M. V. R. Co. v. Baldwin* (Tenn.), 12 R. R. R. 856, 35 Am. & Eng. R. Cas., N. S., 856; foot-notes appended to *Saunders v. Southern Ry. Co.* (C. C. A.), 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596.

†See foot-notes appended to *Saunders v. Southern Ry. Co.* (C. C. A.), 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596.

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Action by P. C. Battle against the Columbia, Newberry & Laurens Railroad. Judgment for plaintiff. Defendant appeals. Affirmed.

W. H. Lyles and N. B. Dial, for appellant.
Simpson & Cooper, for respondent.

POPE, C. J. This is an action for damages. The complaint is as follows:

"The plaintiff, complaining of the defendant, alleges:

"(1) That the defendant is, and at the times hereinafter stated was, a corporation duly chartered, organized, and doing business under the laws of the state of South Carolina, and owning and operating a line of railroad as a common carrier of goods and passengers between Columbia, South Carolina, and Laurens, South Carolina, a part of said line being in Laurens county and said state, and that Clinton, South Carolina, is a station on said road.

"(2) That on December 30, 1901, Mrs. Bettie Battle, the wife of the plaintiff, with a view to becoming a passenger over the defendant's line of railroad from Laurens, S. C., to Clinton, S. C., about 12 o'clock m. of the said day delivered to the agents of the defendant, at its depot and baggage room at Laurens, S. C., through N. S. Garrett, a trunk containing her wearing apparel, jewelry, the wearing apparel of her children and plaintiff's children, some bedclothes, provisions, five dollars in money, and other articles, for the purpose of having the same checked as her baggage over the defendant's railroad from Laurens, S. C., to Clinton, S. C., to which place she was going as a passenger over the defendant's said road, and the defendant, through its agent, received the said trunk for that purpose.

"(3) That, shortly after the delivery of the said trunk to the defendant, the said Mrs. Bettie Battle went to the ticket office of the defendant at Laurens, S. C., for the purpose of obtaining passage over the defendant's said railroad to Clinton, S. C., but while she was purchasing her ticket the train over defendant's road from Laurens to Clinton left Laurens, and she was compelled to remain in Laurens until the next day. That shortly after the train left she went to the baggage room of the defendant at Laurens, S. C., to inquire about the trunk, and found the same missing and lost.

"(4) That the defendant, through its negligence and the negligence of its agents and servants, suffered the said trunk to be lost or stolen, and, although the plaintiff has made frequent demands upon the defendant to deliver the said trunk to him, it has failed and still fails to do so.

"(5) That the said trunk and its contents were reasonably worth the sum of two hundred dollars.

"(6) That the plaintiff had been put to considerable trouble and expense in searching for said trunk, and in providing wearing apparel for his wife and children, to the amount of

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fifty dollars, which expense was caused by the negligence of the defendant in failing to deliver the said trunk to the plaintiff, as it was its duty to do.

"(7) That the said trunk and contents were the property of this plaintiff.

"(8) That the plaintiff, by reason of the negligence of the defendant in failing to deliver the said trunk to him, has suffered damage to the amount of two hundred and fifty dollars.

"Wherefore the plaintiff demands judgment against the defendant for the sum of two hundred and fifty dollars damage, and for the cost of this action."

Answer:

"The defendant, by William H. Lyles, its attorney, answering the complaint in the above-entitled cause:

"(1) Admits the allegations contained in the first paragraph of the complaint.

"(2) Denies each and every other allegation in said complaint contained."

The trial came on before Judge Dantzler and a jury. The trend of the testimony led to establishing this state of facts: On the 30th December, 1901, the trunk of Mrs. Bettie Battle was carried to the depot of the Columbia, Newberry & Laurens Railroad, at Laurens, S. C., by Mr. Garrett, and, by the direction of Mr. Crisp, an agent of the said defendant railway company, it was placed in front of the door of its baggage room, under an assurance of said agent that he would attend to it as soon as he got through some work upon which he was then engaged. The trunk was described as a trunk covered with zinc and strapped by ropes, belonging to a lady who would soon come to the said depot. Mrs. Bettie Battle came down about 2 o'clock, and bought a ticket from Laurens to Clinton, S. C., over the defendant's railroad. She could not find her trunk, and missed taking the train until the next day. She had her brother and brother-in-law to assist her in looking for her trunk, but it was never recovered. Its contents were \$50 worth of her clothing; \$5 in money; two rings (gold finger rings), valued at \$15; her children's clothes, valued at \$30; some small gold pins, valued at \$5; some \$5 worth of cake, sausage meat, and butter; also a counterpane and blanket. The trunk value was \$5. The husband of Mrs. Bettie Battle, the plaintiff, P. C. Battle, brought suit for \$250. A motion for nonsuit was overruled. Defendant's testimony was offered. After a charge from the presiding judge, the jury brought in a verdict for \$121.50. Thereupon defendant appealed to this court on the following grounds, to wit:

"(1) Because the circuit judge erred in allowing P. C. Battle to testify, against objection of defendant, to the contents of the trunk—that there was money and jewelry in it.

"(2) Because he erred in not granting defendant's motion

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for nonsuit, because there was no testimony to show that Crisp was agent for its company: (a) Because there was no testimony to show that the trunk was delivered to the defendant.

"(3) Because he erred in not granting defendant's motion for nonsuit on the ground that the action could not be maintained in the name of P. C. Battle, whereas the testimony showed the trunk and its contents were the separate property of Mrs. Bettie Battle.

"(4) Because he erred in not granting defendant's motion for nonsuit, even if the clothing of the children belonged to the father, the plaintiff, for he was not a passenger nor intended passenger.

"(5) Because he erred in not granting defendant's motion for nonsuit on the ground that there was no contractual relation between it and the plaintiff.

"(6) Because he erred in not granting defendant's motion for nonsuit, inasmuch as there was not a particle of testimony showing that it had any notice whatever that Mr. Battle intended becoming a passenger over its line, and by purchasing a ticket later could not fix the liability on it, there being a joint agency.

"(7) Because he erred in charging the jury, 'When a party delivers baggage to a railroad company, with intention of becoming a passenger, and the road so accepts it, the company will be liable', the error being there was no testimony whatever going to show that the defendant had accepted the trunk, or had any notice that the said Battle intended to become a passenger over its particular line.

"(9) Because he erred in charging the jury, 'If you find that P. C. Battle gave the property to his wife simply to be used by her as his wife, then it is his property, and that he is the proper plaintiff in the case.'

"(10) Because he erred in making a similar charge as the above as to the children's clothes.

"(11) Because he erred in charging the jury the plaintiff could recover for the provisions of the wife, and would be liable for such, and for money and jewelry.

"(12) Because he erred in not setting verdict aside and granting a new trial on defendant's motion, the same being contrary to the law and the evidence in the case."

We will now proceed to pass upon these grounds of appeal in their order.

1. The wife of plaintiff had fully testified to the contents of the lost trunk. The witness P. C. Battle did not attempt to say what articles of property were in the trunk. He was not with his wife when she packed the trunk, and he testified that he only knew because his wife had told him. There was therefore no harm done defendant. Exception overruled.

2. We cannot sustain this exception, for there was testi-

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mony showing Mr. Crisp's connection with defendant railway. The value of that testimony was for the jury. Exception overruled.

3. P. C. Battle could maintain his action for any of his property which was in the trunk. He could certainly sue for the \$5 in cash and for his children's clothing. There was testimony that those articles were in that trunk, and that said trunk was carried to the defendant's depot, and delivered at the baggage room in accordance with its agent's direction. This exception is overruled.

4. We cannot hold that Mrs. Battle, to whom plaintiff's property was confided, and who purchased a ticket over defendant's railroad, could not lawfully include her husband's property in her trunk, and that the defendant did not thereby owe a duty to plaintiff therefor, which duty so owed entitled the plaintiff to maintain an action against it therefor. This exception is overruled.

5. We cannot sustain this exception, for the reason just given in discussing the fourth exception.

6. It was not necessary for Mr. Battle to become a passenger, to enable him to recover from the defendant the value of his property which passed into defendant's hands through the contractual relation of Mrs. Battle with defendant. This exception is overruled.

7. We do not think this question was fairly presented to the circuit judge, but, even if it was directly presented, the fact that the plaintiff was not a passenger, but that his wife was such, while she was intrusted with plaintiff's property, would make the railroad responsible to him for such property.

8. We overrule this exception because there was some testimony on this issue.

9. We must sustain this exception. We are not satisfied with the position of the circuit judge on this branch of the case. By our Constitution, a married woman can acquire a right of property by gift. She is, as to that property, its owner. It might be that a clash of claims might arise as between the husband and wife themselves. The railroad should not be liable to pay to each one separately for the property under the circumstances involved in the suit.

10. There was no error by the circuit judge as to the plaintiff's right of action for his children's clothing, under the circumstances of this case.

11. We only sustain this exception as to the husband's right of action for the \$5 in money.

12. The verdict of the jury covering the value of all of the property—both that of the husband and the wife—the motion for a new trial should have been granted.

I think the judgment should be reversed.

HART *v.* SEATTLE, R. & S. RY. CO.

(Supreme Court of Washington, March 10, 1905.)

[79 Pac. Rep. 954.]

Carriers—Personal Injuries—Instructions—Degree of Care.*

In an action by a passenger against a railroad for injuries alleged to have been sustained by the plaintiff turning his ankle on a strip nailed to the platform where the passenger alighted, an instruction that the degree of care to be exercised by a carrier of passengers for hire is the highest degree of care that is consistent with the reasonable and practicable operation of its business, in view of the means and methods of conveyance employed, was not cause for reversal, especially as another instruction that it is the duty of a carrier to provide and keep the landing places and platforms used by it for discharging passengers from its vehicles, and all passageways leading to and from such places, in a reasonably safe condition for the purposes intended, and other instructions in which the necessity for reasonable care was repeated, were given.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by A. L. Hart against the Seattle, Renton & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Peters & Powell, for appellant.

Averill Beavers and James A. Snoddy, for respondent.

HADLEY, J. This is an action for damages for personal injuries received by plaintiff upon the station platform of defendant company at Hillsman City. The defendant owns and operates an electric railway between Seattle and Renton, and the plaintiff was a passenger upon one of its cars. When

*As to the carrier's duties with respect to the safety of stations, platforms, and other stopping places, see foot-notes appended to *Newcomb v. New York Cent., etc.*, R. Co. (Mo.), 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10; *Lemon v. Grand Rapids & I. Ry. Co.* (Mich.), 12 R. R. R. 853, 35 Am. & Eng. R. Cas., N. S., 853; *Matthieson v. Burlington, etc., Ry. Co.* (Iowa), 12 R. R. R. 826, 35 Am. & Eng. R. Cas., N. S., 826; *Ellis v. Chicago, etc., Ry. Co.* (Wis.), 12 R. R. R. 122, 35 Am. & Eng. R. Cas., N. S., 122; *Lehigh Valley R. Co. v. Dupont (C. C. A.)*, 12 R. R. R. 83, 35 Am. & Eng. R. Cas., N. S., 83.

As to the degree of care required of a carrier of passengers, see foot-notes appended to *Reagan v. St. Louis Transit Co.* (Mo.), 13 R. R. R. 688, 36 Am. & Eng. R. Cas., N. S., 688; foot-notes appended to *Birmingham Ry., Light & Power Co. v. Bynum* (Ala.), 13 R. R. R. 683, 36 Am. & Eng. R. Cas., N. S., 683; *Foster v. Seattle Elec. Co.* (Wash.), 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640, foot-notes appended to *Magrane v. St. Louis & S. Ry. Co.* (Mo.), 13 R. R. R. 1, 36 Am. & Eng. R. Cas., N. S., 1; *Johnson v. Seattle Elec. Co.* (Wash.), 12 R. R. R. 786, 35 Am. & Eng. R. Cas., N. S., 786; *Logan v. Metropolitan St. Ry. Co.* (Mo.), 12 R. R. R. 753, 35 Am. & Eng. R. Cas., N. S., 753; *Fitch v. Mason City & C. L. Traction Co.* (Iowa), 12 R. R. R. 451, 35 Am. & Eng. R. Cas., N. S., 451; *Howell v. Lansing City Elec. Ry. Co.* (Mich.), 12 R. R. R. 61, 35 Am. & Eng. R. Cas., N. S., 61.

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the car stopped at Hillman City, the plaintiff was in the act of stepping from the car to the station platform, when it is alleged that it was dark. It is also alleged that directly beneath the step of the car a piece of wood, about two inches thick and four inches wide, was nailed upon the station platform, and projected above the level thereof; that the strip ran at right angles with the longitudinal direction of the car and track, extending outward from the track the full width of the platform; that the plaintiff stepped upon the edge of this projection, when his ankle turned, causing him to fall, whereby he received severe injuries in the ankle and in both legs. The answer does not deny the condition of the platform, but avers that the defendant had not knowledge thereof, and also pleads contributory negligence. The cause was tried before a jury, and a verdict was returned for the plaintiff in the sum of \$1,000. The defendant moved for a new trial, and the court required the plaintiff to elect to accept a remittance of \$500 from the amount of the verdict, or submit to a new trial. The plaintiff so elected, and judgment was thereupon entered in his favor for \$500. The defendant has appealed.

There is but one assignment of error. It is urged that the court erred in giving the following instruction: "You are instructed that the degree of care to be exercised by a common carrier of passengers for hire is the highest degree of care that is consistent with the reasonable and practical operation of its business, in view of the method and means of conveyance employed." Appellant's argument is that the high degree of care required of carriers of passengers applies only to those means for safety which the passenger must of necessity trust wholly to the carrier, and that the rule does not apply to grounds, depots, and platforms. It must be conceded, however, that at least reasonable care is required as to the condition of depots and platforms. The criticised instruction does not say that the highest possible degree of care is required, but only the highest "that is consistent with the reasonable and practical operation of its business, in view of the method and means of conveyance employed." Moreover, the following further instruction was given: "You are instructed that it is the duty of a carrier of passengers to provide and keep the landing places and platforms used by it for discharging passengers from its vehicles, all passageways leading to and from such places, in a reasonably safe condition for the purposes intended, and for any violation of its duty in this respect which entails injury upon a passenger, without fault on his part, the carrier will be answerable in damages." The necessity for reasonable care was also repeated in other instructions. We think the instructions, as a whole, made it clear to the jury that it was the trial court's view that not the highest possible degree, but a reasonable degree, of care was required. That at

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least such was required of appellant in the care of its station platform is sustained by the following: *Bethmann v. Old Colony R. Co.* (Mass.) 29 N. E. 587; *Jordan v. N. Y. N. H. & H. R. Co.* (Mass.) 43 N. E. 111, 32 L. R. A. 101, 52 Am. St. Rep. 522; *Missouri Pacific Ry. Co. v. Wortham* (Tex.) 10 S. W. 741, 3 L. R. A. 368; *Wallace v. Wilmington & N. R. Co.* (Del.) 18 Atl. 818; *Knight v. Portland, Saco & Portsmouth R. Co.*, 56 Me. 234, 96 Am. Dec. 449; *Pennsylvania Co. v. McCaffrey* (Ill.) 50 N. E. 713. An examination of the above authorities discloses that most of them recognize that the necessary degree of care under such circumstances is higher than merely ordinary and reasonable care. We think the instructions in the case at bar were at least within, and that they certainly did not go beyond, well-recognized rules.

The judgment is affirmed.

MOUNT, C. J., and FULLERTON and DUNBAR, JJ., concur.

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(Court of Appeals of Kentucky, Feb. 21, 1905.)

[84 S. W. Rep. 1175.]

Use of Abusive Language to Passengers—Question for Jury.

In an action against a railroad company for the use of abusive and threatening language by one of its employees to a passenger, evidence held to justify submission to the jury of the question whether the employee or the passenger was the aggressor.

Duty to Protect Passengers.*

The law implies a contract on the part of the carrier to protect the passenger from the insults and wanton interference of strangers, fellow passengers, and the carrier and its servants.

Use of Abusive Language to Passenger—Evidence—Admission of Employee.

In an action against a railroad company for the use of threatening and abusive language by a brakeman to a passenger, evidence that the brakeman, some time after the occurrence, said to witness that he started to slap plaintiff, and was sorry he did not do it, was incompetent.

*As to the liability of the carrier for insults to and assaults on its passengers by its employees, see *Alabama & V. R. Co. v. Livingston* (Miss.), 13 R. R. R. 464, 36 Am. & Eng. R. Cas., N. S., 464; foot-note appended to *Riser v. Southern Ry. Co.* (S. Car.), 10 R. R. R. 244, 33 Am. & Eng. R. Cas., N. S., 244; foot-note appended to *Louisville & N. R. Co. v. Rountt* (Ky.), 10 R. R. R. 344; 33 Am. & Eng. R. Cas., N. S., 344; *Gillespie v. Brooklyn Heights R. Co.* (N. Y.), 12 R. R. R. 66, 35 Am. & Eng. R. Cas., N. S., 66.

As to the duty of the carrier to protect its passengers against other passengers, see foot-note appended to *Spangler v. St. Joseph & G. I. Ry. Co.* (Kan.), 13 R. R. R. 208, 36 Am. & Eng. R. Cas., N. S., 208.

As to the duty of the carrier to protect its passengers against strangers, see foot-note appended to *Tate v. Illinois Cent. R. Co.* (Ky.), 12 R. R. R. 482, 35 Am. & Eng. R. Cas., N. S., 482.

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Same—Evidence—Curing Error—Admission of Employee.

In an action against a railroad company for abusive and threatening language used by an employee to a passenger, the employee admitted the use of the language, but contradicted plaintiff's testimony that he started toward plaintiff as if to assault him: *held*, that this admission did not render harmless the introduction of incompetent evidence that the employee had afterwards said that he started to slap plaintiff, and wished he had done so.

Appeal from Circuit Court, Graves County.

Action by Luther Winslow against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Robbins & Thomas, J. M. Dickinson, Pirtle & Trabue, and O. L. Price, for appellant.

W. J. Webb and B. Gardner, for appellee.

SETTLE, J. Appellee, by verdict of a jury and judgment of the court below, recovered of appellant \$200 in damages. It appears from the statements of the petition that appellee, while a passenger in a caboose of one of appellant's freight trains, traveling from Wingo to Mayfield, Ky., upon a first-class ticket, which he had purchased before taking the train, was insulted and threatened with violence by appellant's brakeman who was charged with the duty of seeing to the comfort and safety of appellee and other passengers on the train; that the alleged insulting, offensive, and threatening language of the brakeman was addressed to appellee because he had accidentally expectorated upon the stove of the caboose; that all that was said and done by the brakeman was in the hearing and presence of other passengers in the caboose, and appellee was, by reason of the wrongful acts and misconduct of the brakeman, subjected to great humiliation of feeling and mental suffering, as well as bodily fear. The answer contained a traverse of the material statements of the petition, and pleaded the alleged misconduct of appellee in expectorating upon the stove, which it was averred he persisted in doing after being requested by the brakeman to desist; that such use of the stove by appellee made a bad odor, and was offensive to the other passengers, and, when politely requested by the brakeman, as it was his duty to do, to stop expectorating upon the stove, appellee became angry, and created the only disturbance that occurred in the car.

Two grounds for a reversal are presented by appellant's counsel, viz.: The admission by the lower court of incompetent evidence in the trial, and the refusal of that court to give the jury a peremptory instruction to find for the appellant when appellee's testimony was concluded.

A careful examination of the bill of evidence convinces us that the court did right in refusing the peremptory instruction, as the evidence introduced by appellee was sufficient, standing alone, to authorize a verdict for some amount in his

behalf. Upon the other hand, that of appellant strongly tended to show that the altercation that occurred between appellee and the brakeman was caused mainly by the misconduct of appellee. In other words, the testimony of appellee himself was to the effect: That he expectorated upon the stove one time by accident. That, upon being reproved by the brakeman, Hamlet, therefor, he told him it was accidental, but, instead of accepting his excuse, the latter said to him, in an insulting and domineering manner: "What did you want to spit on that stove for? Was it to hear it fry? You better go home and spit on your grandmamma's bed, and see what she would do." That Hamlet continued to talk to appellee in an angry and insulting manner, and appellee said to him, "I understand what you mean, and I think you have said enough about it." Whereupon Hamlet turned to the conductor, who had just entered the caboose, and asked him if appellee was a passenger, and, upon being told that he was, he said, again turning to appellee, "If you wasn't, damn you! I would knock your lungs out." Upon being told by appellee, "No, he would't, either," he said, "Yes, I would," and started towards appellee, who, according to his further statements, said no more, as he was afraid Hamlet would strike him. Two of the passengers—a man and a woman—corroborated appellee in large measure, though they did not hear all that was said by either appellee or the brakeman. Their testimony, however, went to show that the brakeman's language was rough, and his conduct aggressive, and both heard him say, if appellee were not a passenger, he would slap a lung out of him. For the appellant three witnesses were introduced—Hamlet, the brakeman; Parker, the conductor; and Saxon. Hamlet's testimony was, in substance, as follows: "It was a very cold evening, and we were coming this way on 192—the local freight, coming north; and this gentleman was sitting there spitting on the stove, and I asked him to stop it. There were some old ladies in the car, and one in particular was coughing right smart, and it seemed to me it was offensive to her. It was offensive to me, and I use tobacco myself; and I remarked to him, 'If you was to spit on your mother's stove, she would take a stick of stove wood and blam you up by the side of the head with it;' and he seemed to get highly insulted, and he says, 'You have said enough; don't speak to me any more;' and spoke very loud, and I asked the conductor if he was a passenger, and he says, 'Yes;' and I says, 'It is a very good thing he is; I would slap a lung out of him.'" The conductor corroborated Hamlet in full, but Saxon's statements were more corroborative of appellee's testimony than of Hamlet's.

It is evident from Hamlet's testimony that he was angry, and his manner aggressive, on the occasion in question; and, if the jury placed full credit in the testimony of appellee and

his witnesses, they, no doubt, came to the conclusion that Hamlet was insulting, and his manner threatening, not to say violent. At any rate, it was the province of the jury to determine whether his conduct was such as to justify a verdict for damages against appellant, whose servant he was. With reference to the duty of a common carrier towards its passengers, "the doctrine is now well established that the law implies a contract for the protection of the party carried from the insults and wanton interference of strangers, fellow passengers, and the carrier and his servants, and for every violation of the implied contract by force or negligence the carrier is liable in an action of contract or tort." Addison on Torts, vol. 1, p. 33, note, and authorities there cited. In discussing this doctrine in *Winnegar's Adm'r v. Central Passenger Railway Co.*, 85 Ky. 547, 4 S. W. 237, this court said: "It is not material whether the violation consists in putting the passenger off at a point before his destination is reached, or by insulting him, or in assaulting him. They are all plain violations of duty, for which a recovery may be had." Again in the same case the court further said: "The law makes the carrier responsible for the acts of the person in charge of the car, and who for the time has the voluntary custody of the passenger, with the implied obligation that he will exercise the highest degree of diligence to transport him safely. In *Goddard v. Grand Trunk Railway*, 57 Me. 202, 2 Am. Rep. 39, it was held that the carrier was obliged to protect his passengers from violence or insult, from whatever source it arises. He must use all such reasonable precautions as are necessary for that purpose." *L. & N. R. Co. v. Ballard*, 85 Ky. 311, 3 S. W. 530, 7 Am. St. Rep. 600; *Same v. Same*, 88 Ky. 159, 10 S. W. 429, 2 L. R. A. 629; *L. & N. R. Co. v. Donaldson*, 43 S. W. 439, 19 Ky. Law Rep. 1384; *Memphis & Cincinnati Packet Co. v. Nagel*, 29 S. W. 743, 16 Ky. Law Rep. 748; *Dawson v. L. & N. R. Co.*, 6 Ky. Law Rep. 668; *Strull v. L. & N. R. Co.*, 76 S. W. 181, 25 Ky. Law Rep. 678.

We deem it unnecessary to comment upon the instructions given by the trial judge, as no complaint is made of them by counsel for appellant. It is only insisted that a peremptory instruction should have been given. It is enough to say that the instructions were as favorable to appellant as it could have been asked.

It is, however, complained that the substantial rights of appellant were prejudiced by the admission of the testimony of Elvis Lamb. This witness was introduced in chief for appellee for the purpose of proving by him a conversation with appellant's brakeman, Hamlet, a few days after the altercation between the latter and appellee, out of which this action arose. It appears that Lamb arrested Hamlet under a warrant charging him with some offense connected with his treatment of appellee on appellant's train, and that Hamlet was

fined in a police court for the offense charged, and it was on the day and at the time of the trial that the conversation in question took place. Lamb was permitted by the court to testify as to that conversation, and he said Hamlet told him, in substance, if it was going to cost him anything, he wished he had slapped a lung out of appellee, and that he started to slap a lung out of him, and was sorry he didn't do it. This testimony was clearly incompetent. In Greenleaf on Evidence, vol. 1, § 113, we find this statement of the law: "The party's own admissions, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then depending, et dum fervet opus. It is because it is a verbal act and part of the *res gestæ* that it is admissible at all, and therefore it is not necessary to call the agent himself to prove it, but, whenever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it; and it follows that, where his right to act in the particular matter in question has ceased, the principal can no longer be affected by his declarations, they being mere hearsay." Taylor on Evidence, vol. 1, § 588. In C. & O. R. Co. v. Reeves' Adm'r, 11 S. W. 464, 11 Ky. Law Rep. 14, the above rule of evidence was considered, and in discussing it the court said: "The testimony of the witness as to the conversation with Hinch, the conductor, in which he is said to have admitted his neglect, was incompetent. * * * In this case the conversation occurred after the accident happened, and after the conductor had left the station, when he was expressing his regret caused by the occurrence, and attaching blame to himself for the injury to the unfortunate man. If this conversation with the witness is to be regarded as a part of the *res gestæ*, then the agent by his declarations can bind his principal after as well as at the time the accident happened or the transaction takes place." L. & N. R. Co. v. Ellis' Adm'r, 30 S. W. 979, 17 Ky. Law Rep. 259; L. & N. R. Co. v. Webb, 99 Ky. 332, 35 S. W. 1117; Parker's Adm'r v. Cumberland Tel. & Tel. Co., 77 S. W. 1109, 25 Ky. Law Rep. 1391.

It is insisted that the proof of the statements of the brakeman, Hamlet, were not prejudicial, in view of his admissions made on the trial of this case of what he said to appellee. All that he then admitted saying to appellee was, if he were not a passenger, he would slap a lung out of him; but in his conversation with Lamb the statement calculated to prove hurtful to appellant was that he started to slap a lung out of appellee, and was sorry he had not done so. The statement was a corroboration of appellee's testimony that he started towards him as if to strike him. We can well imagine that it must have had great weight in causing the jury to find for appellee. At any rate, it was not part of the *res gestæ*, and

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therefore incompetent, and the court should have excluded it.

Appellee, upon the cross-examination of Hamlet, might have laid the foundation for contradicting him by obtaining his denial of the statements attributed to him by Lamb, in which event Lamb could have been introduced in rebuttal to prove the statements; but even then it would have been the duty of the court to tell the jury that the statements as testified to by Lamb might be considered by them, not as substantive evidence, but only for the purpose of contradicting and discrediting Hamlet.

Because of the error of the court in admitting proof of the conversation between Hamlet and Lamb, the judgment is reversed, and cause remanded for a new trial and other proceedings consistent with the opinion.

DAMBMANN v. METROPOLITAN ST. RY. CO.

(Court of Appeals of New York, Feb. 3, 1905.)

[73 N. E. Rep. 59.]

Street Railroads—Injury to Passenger—Instruction.

A complaint alleged that plaintiff was injured by the sudden starting of a street car after it had stopped at her request, while she was attempting to alight. The evidence was conflicting. The court instructed that there was no alleged negligence on which a recovery could be based, except the sudden starting of the car after it came to a full stop: *held*, that the refusal to charge that she could not recover unless she satisfied the jury by testimony of greater weight than that of defendant that the accident happened because of the sudden starting of the car after it came to a full stop in response to her signal was prejudicial error.

Bartlett, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Emma A. Dambmann against the Metropolitan Street Railway Company. From a judgment of the Appellate Division (86 N. Y. Supp. 1133, 91 App. Div. 612) affirming a judgment for plaintiff, defendant appeals. Reversed.

Charles F. Brown, Bayard H. Ames, and Henry A. Robinson, for appellant.

Theodore Sutro, for respondent.

HAIGHT, J. The action was brought to recover damages for a personal injury. The complaint alleged that the plaintiff was a passenger upon one of the defendant's cars; that she had asked the conductor to stop the same for the purpose of allowing her to alight, and that thereupon the car stopped, and she left her seat, and attempted to alight therefrom, "but that, through the negligence and carelessness of the conductor or motorman, or both, said car was suddenly and violently started while the plaintiff was in the act of

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alighting therefrom; that, in consequence of the aforesaid negligence, and without fault or negligence on the part of the plaintiff, she was violently thrown down into the street," and received the injuries for which this action was brought. This allegation is the only act of negligence alleged in the complaint.

Upon the trial it appeared that on the 24th day of November, 1899, a little before half past 6 o'clock in the evening, the plaintiff attempted to alight from one of the defendant's cars on Vanderbilt avenue, between Forty-Second and Forty-Third streets, in the city of New York; that in so attempting to alight she fell upon the pavement, and received the injuries complained of. She was a woman 25 years of age at the time, was a singer by profession, and was on her way to Yonkers to attend a choir rehearsal. It was her intention to enter a drug store on the northwest corner of Forty-Second street and Vanderbilt avenue and get some torches, and then to take the New York Central train at half past 6 o'clock for the place of her destination. Her testimony was to the effect that she asked the conductor to stop the car after it had turned the corner from Forty-Second street into Vanderbilt avenue, and that in consequence of such request the car was stopped a short distance north of Forty-Second street, and that several persons alighted therefrom; that she attempted to alight, but just as she was stepping to the ground the car started suddenly, throwing her violently upon the street. The testimony of Dr. Walton, her attending physician, who was sworn in her behalf, was to the effect that he was standing upon the rear platform of the car, and that she was hit by the "hind rail of the car" as it passed her, and was thrown to the pavement, and that he could not say whether her feet were on or off the car at the time when it started. On behalf of the defendant there was testimony given by three witnesses, who, in substance, stated that she attempted to alight from the car before it had come to a stand, by taking hold of the rear rail and stepping off, and in doing so was thrown to the pavement.

The trial court, in submitting the case to the jury, gave general instructions to the effect that the plaintiff must prove to their minds "by a fair preponderance of evidence that this fall was caused by the negligent act of this defendant corporation." He did not, however, instruct the jury as to the particular act of negligence alleged in the complaint upon which the plaintiff relied for a recovery of damages. At the conclusion of the charge the defendant's counsel requested the court to instruct the jury that "the plaintiff cannot recover unless she satisfied you by testimony of greater weight than that offered by the defendant that the accident happened by reason of the sudden starting of the car after it had come to a full stop in response to a signal or request given by her to the conductor." This the court refused to charge, except as it had heretofore charged.

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The court, as we have seen, had charged as to the weight of the evidence necessary, but had neglected to charge the latter clause embraced in the request as to the sudden starting of the car after it had come to a full stop. Inasmuch as this was the specific act of negligence alleged in the complaint, the request was proper, and should have been charged. It was important, in view of the conflicting evidence in the case, and especially in view of the testimony of the plaintiff's witness Walton, who, in substance, had testified that she was hit by the back rail of the car. The refusal to charge as requested was therefore an error which calls for a reversal of the judgment, unless it was subsequently cured. After passing upon a number of other requests to charge, the defendant asked the court to charge "that there is no alleged negligence of the defendant upon which a recovery can be based in this case except the sudden starting of the car after it came to a full stop." This the court refused to charge, and an exception was taken, but subsequently the trial judge asked to see the complaint, and after looking at that instrument the court withdrew the refusal to charge the last request, and charged it as requested. Thereupon the defendant's counsel asked the court to change his refusal to charge the first request, but the court refused to charge it, except as already charged. To this the defendant's counsel took another exception. We think, in view of the general language used by the court in its main charge, the defendant had the right to have the jury plainly instructed as to the acts of negligence upon which a recovery could be had; that the conflicting rulings of the court served to confuse the jurors as to the true rule of law which was to govern them in determining the questions of fact involved; and that the error in refusing to charge the first request was not cured by that which subsequently occurred in the concluding request, to which attention has been called.

There were a number of exceptions taken to the admission of evidence, which we do not deem it necessary to here consider. The error pointed out requires a new trial, and upon such trial questions with reference to evidence may be eliminated.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

NORFOLK & W. RY. CO. *v.* TOWN OF SUFFOLK.

(Supreme Court of Appeals of Virginia, Jan. 26, 1905.)

[49 S. E. Rep. 658.]

Business License—Railroad Companies—Municipal Authority.*

Suffolk Town Charter, § 18, providing that "Whenever any business, trade, occupation, calling, or any other thing, is to be done within the town for which a state license is or may be required, the council may require a town license to be had for doing the same," authorizes an ordinance imposing a license tax on a railroad company doing business in the town, though it is for a failure to transact its business as provided by Code 1887, § 1200, in addition to its common-law liability, amenable, under section 1201, to a fine.

Same—Same—Constitutional Provisions.*

Suffolk Town Charter, § 18, providing for an occupation tax, as applied to the business of a railroad company, is not in conflict with Const. art. 10, § 4 [Va. Code 1904, p. cclxii, § 170], permitting the legislature to impose license tax on any business which cannot be reached by the ad valorem system.

Error to Circuit Court, Nansemond County.

Action by the town of Suffolk against the Norfolk & Western Railway Company to recover a license fee. From a judgment for plaintiff, defendant brings error. Affirmed.

Geo. S. Bernard, Legh. R. Watts, and Jos. I. Doran, for plaintiff in error.

J. U. Burgess, for defendant in error.

WHITTLE, J. This controversy involves the construction of section 18 of the charter of the town of Suffolk, and the validity of an ordinance passed in pursuance thereof, imposing a license tax of \$50 on the plaintiff in error for the privilege of conducting its business in that town.

The language of the charter pertinent to this inquiry is as follows: "Whenever any business, trade, occupation,

*As to the right to impose occupation tax on railroad company, see *Allen v. Pullman's Palace Car. Co.* (U. S.), 11 R. R. R. 640, 34 Am. & Eng. R. Cas., N. S., 640 (taxation of sleeping car companies); *New York ex rel. Pennsylvania R. Co. v. Knight* (U. S.), 11 R. R. R. 592, 34 Am. & Eng. R. Cas., N. S., 592 (tax on cab service furnished by railroad); *Pullman Company v. Adams* (U. S.), 8 R. R. R. 2, 31 Am. & Eng. R. Cas., N. S., 2 (taxation of sleeping car companies); *Nashville, C. & St. L. Ry. Co. v. Alabama City* (Ala.), 5 R. R. R. 251, 28 Am. & Eng. R. Cas., N. S., 251 (city ordinance imposing tax on railroad companies running cars through city not an interference with interstate commerce); *Newport News, etc., Ry. & Elec. Co. v. City of Newport News* (Va.), 1 R. R. R. 453, 24 Am. & Eng. R. Cas., N. S., 453; *City of Boston v. Union Freight R. Co.* (Mass.), 2 R. R. R. 895, 25 Am. & Eng. R. Cas., N. S., 895; note, 14 Am. & Eng. R. Cas., N. S., 208 (license tax imposed on corporation engaged in interstate commerce); note, 13 Am. & Eng. R. Cas., N. S., 874 (cars of foreign companies); *Alabama G. S. R. Co. v. City of Bessemer* (Ala.), 6 Am. & Eng. R. Cas., N. S., 410 (constitutionality of city license tax where railroad is engaged in interstate commerce); *City of York v. Chicago B. & Q. R. Co.* (Neb.), 14 Am. & Eng. R. Cas., N. S., 200.

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calling, or any other thing, is to be done within the town of Suffolk for which a state license is or may under the Constitution of this state or the Constitution and laws of the United States be required, the council may require a town license to be had for doing the same."

Conceding the soundness of the proposition that the intention of the state to clothe a municipal corporation with a portion of its own sovereignty in the matter of levying taxes must be manifested in plain and unambiguous terms, the court is nevertheless of opinion that the phraseology of the charter in question measures up to that requirement. Language substantially the same as that employed in this instance has been so repeatedly and so recently construed by this court to confer upon a municipality a general power of taxation, subject only to such limitations as may be imposed by the Constitution of the state or of the United States, that a discussion of the subject would be unprofitable. *Ould & Carrington v. City of Richmond*, 23 Grat. 464, 14 Am. Rep. 139; *Humphreys v. City of Norfolk*, 25 Grat. 97; *City of Norfolk v. Norfolk Landmark Co.*, 95 Ga. 564, 28 S. E. 959; *Newport News, etc., R. Co. v. City of Newport News*, 100 Va. 157, 40 S. E. 645; *Woodall v. City of Lynchburg*, 100 Va. 318, 40 S. E. 915; *Blanchard v. City of Bristol*, 100 Va. 469, 41 S. E. 948; *City of Norfolk v. Griffith-Powell Co.*, 102 Va. 115, 45 S. E. 889; *Gordon v. City of Newport News*, 102 Va. 649, 47 S. E. 828.

It is sought, however, to distinguish this case from the foregoing authorities on the theory that the Legislature cannot be presumed to have intended to authorize the town of Suffolk to impose upon the plaintiff in error a license tax, enforceable by fine, for doing a business which it was required by statute to transact under pain of forfeiture. (The section of the Virginia Code of 1887, relied on—sections 1200 and 1201—have since been repealed. Acts 1904, p. 55.)

The argument is more specious than sound, and, carried to its logical conclusion, would have afforded a ready means of escape from taxation to a large class of businesses of a quasi public nature, for the exercise of which license tax might have been imposed under the Constitution of 1869; for example, ordinary keepers, express, telegraph, and telephone companies, street railroad companies, and the like.

The statute is declaratory merely of the common-law duty of transportation companies; and for a failure to discharge that duty, independently of statute, they would be liable in damages to any person injuriously affected by the omission. The differentiating features, therefore, between a railroad company and other common carriers, is that for a failure to discharge the duties enumerated in section 1200 the former was, in addition to its common-law liability, amenable, under section 1201, to a forfeiture of not less than \$25 nor more than \$100, recoverable by the injured party by motion or

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action. So far, consequently, as the argument that the Legislature cannot be presumed to have intended to delegate to the town of Suffolk authority to demand a license tax of a railroad company for doing that which the law required it to do is concerned on principle the argument is equally applicable to all other public service corporations.

That the business of railroad companies may be subjected to a license tax is distinctly declared in the cases of *Anniston v. Southern Ry. Co.*, 112 Ala. 557, 20 South. 915, and *Florida Cent. R. R. Co. v. City of Columbia* (S. C.) 32 S. E. 408.

In *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 376, 2 Sup. Ct. 265, 27 L. Ed. 419, it was said: "That the power of the state to authorize any city within its limits to enforce a license tax on trades or callings generally, especially those which are quasi public, cannot be disputed; and that, whether a license fee is exacted under the power to regulate or the power to tax, is a matter of indifference if the power to do either exists." See, also, *Postal Tel. C. Co. v. City Council of Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871.

It must be observed that the ordinance under consideration does not make the payment of the license tax a condition precedent upon which the right of the plaintiff in error to carry on its business depends. It merely imposes the tax, and the ability to fine for a violation of the ordinance is a remedial incident of the original power. *Blanchard v. City of Bristol*, supra.

This is made plain by the case of *Home Ins. Co. v. City of Augusta*, 93 U. S. 123, 23 L. Ed. 825, where, in discussing the character of a license tax, the court said: "This court (in the License Tax Cases, 5 Wall. 462, 18 L. Ed. 497) held that the payment required was a special tax, levied in the manner described; that the penalty provided was a mode of enforcing its payment; and that the license, when issued, was only a receipt for the tax. * * * In the ordinance in question the tax is designated 'a license tax,' but its payment is not made a condition precedent to the right to do business. No special penalty is prescribed for its nonpayment, and no second license is required to be taken out. Had the ordinance been otherwise in these particulars, we have seen, viewing the subject in the light of the License Tax Cases, that the result would have been the same."

Finally, it is insisted that, if the Legislature, by section 18 of the charter, intended to give the town council power to require a railroad company to take out a license and pay a tax for the privilege of doing business therein, the section is unconstitutional, because contrary to the provisions of section 4 of article 10 of the state Constitution [Va. Code 1904, p. cclxii, § 170].

That section, it will be recalled, after authorizing the levy of a license tax upon certain specified businesses, concludes:

"and all other businesses that cannot be reached by the ad valorem system."

With respect to the foregoing provision this court said, in *Gordon v. City of Newport News*, supra: "The Legislature, or a municipality possessing full powers of taxation under its charter, must decide primarily whether a particular business can or cannot be reached by the ad valorem system; and with the exercise of their discretion the courts may not interfere, except in case of a plain departure from the constitutional requirement. The question is one of power, and not of policy, so far as the courts are concerned; and they are without authority to control legislative discretion, even if, in their opinion, it is violative of sound principles of political economy, unless in its exercise it contravenes some provision of the Constitution of the state or of the United States. Subject only to that limitation, the discretion of the legislative department of the government in the administration of the fiscal affairs of the commonwealth is exclusive and supreme."

It not only cannot be affirmed that the imposition of a license tax on the business of the plaintiff in error is "a plain departure from the constitutional requirement," but, under similar charters, such action on the part of city councils has been sanctioned by this court in the analogous cases of *Newport News, etc., R. Co. v. City of Newport News*, supra, and *Postal Tel. Cable Co. v. City of Norfolk*, 101 Ga. 125, 43 S. E. 207.

In the latter case the court said: "A city ordinance imposing a privilege tax on a telegraph company is not in conflict with section 4, art. 10, of the Constitution of this state [Va. Code 1904, p. cclxii, § 170], permitting the Legislature to impose a license tax on any business which cannot be reached by the ad valorem system. The tax imposed by the ordinance is a tax imposed upon the privilege of doing business in the city, and is wholly different from a property tax. It is immaterial that the state taxes the property of the company on the ad valorem system. The two subjects of taxation are wholly different, and both may be taxed without being obnoxious to the objection that it is double taxation."

The above authorities show conclusively that the last contention is without merit, and cannot be maintained.

It must be remembered that this case arose under the Constitution of 1869, and what has been said with respect to the power of the defendant in error to impose the license tax in question has no reference to a case arising under the present Constitution.

For these reasons the judgment of the circuit court of Nansemond county is without error, and must be affirmed.

SOUTHERN CALIFORNIA RY. CO. v. WORKMAN, City Treasurer of Los Angeles et al.

(Supreme Court of California, Jan. 25, 1905.)

[79 Pac. Rep. 586.]

Municipal Corporations—Streets—Improvements—Railroad Right of Way—Liability of Assessment.*

Vrooman Act, § 7 (Laws 1885, p. 147, as amended by Laws 1891, p. 196) providing for an assessment on the lots and lands fronting on the improved portion of a street, to pay for such improvement, does not authorize the assessment of a special tax for street improvement on a portion of a railroad right of way abutting the improved street, not subject to sale on execution, and necessary to enable the railroad company to operate its road under its franchise.

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Suit by the Southern California Railway Company against W. H. Workman, as city treasurer of the city of Los Angeles, Cal., and another. From a decree in favor of plaintiffs, defendants appeal. Affirmed.

Cole & Cole, for appellants.

C. N. Sterry and T. J. Norton, for respondent.

COOPER, C. Action to enjoin a sale of a portion of plaintiff's right of way. A temporary injunction was granted, which by the judgment was made perpetual. This appeal is from the order granting the injunction and from the judgment.

The plaintiff is a railroad corporation operating a railroad about 487 miles in length, in and through five counties in the southern part of the state. A portion of its main line, running from Los Angeles to Barstow, is located and operated in Los Angeles county, and 1,012 feet of the right of way of this line abuts on Pasadena avenue, in the city of Los Angeles. The city proceeded to make certain improvements on Pasadena avenue under the provisions of the statutes authorizing the making of such improvements and the charging of the costs to abutting property. By the proceedings of the city council the cost of the improvements was to be assessed upon abutting property upon the front foot method provided by statute. An assessment for the purposes of said improvement was attempted to be made upon a small portion of plaintiff's right of way, consisting of an irregular strip, about 9,500 feet in length and from 60 to 100 feet in width, which attempted assessment described the property as follows: "Commencing at N. W. intersecting point of

*As to whether railroad property is liable to local assessments, see foot-note appended to *Orth v. Park & Co.*, 12 R. R. R. 536, 35 Am. & Eng. R. Cas., N. S., 536; foot-note appended to *Chatham County Com'rs v. Seaboard A. L. Ry.* (N. Car.), 11 R. R. R. 859, 34 Am. & Eng. R. Cas., N. S., 859.

Avenue 33 and the right of way of the Southern California Railway Company, thence meandering in a northerly direction 9635 min. to Avenue 50, thence along the S. line of Avenue 50, 62 min. thence meandering in a southerly direction 9566 min. to Avenue 33, thence W. 60 along the N. line of Avenue 33 to beginning. Being the Southern California Railway right of way between Avenues 33 and 50." Plaintiff refused to pay the amount of the attempted assessment, and a bond was issued by the city, and sold to appellant Fox. The bond described the property assessed the same as in the above description in the assessment, except the words, "Being the Southern California Railway right of way between Avenues 33 and 50," were omitted, and instead thereof the words "Owner is the Southern California Railway Company, a corporation," were added. The notice of sale described the property as it is described in the bond. Plaintiff commenced this action to enjoin the sale, and, after setting forth the facts, alleged in its complaint "that, unless restrained from so doing, the said defendant W. H. Workman, as such city treasurer, at the request of the defendant Fox, will on Tuesday, the 14th day of January, 1902, proceed, under said advertisement and notice of sale, to sell or attempt to sell that portion of the right of way of the plaintiff hereinabove described, and upon which it is operating a railroad as aforesaid, in accordance with said notice, for the purpose of satisfying said bond." The complaint further alleged that the threatened sale would cause it great and irreparable injury, and "create a cloud upon the title of the plaintiff to said portion of said right of way, and to its right to use and occupy the same as and for its business of a common carrier of passengers and freight." The defendants filed a general demurrer to the complaint, which was overruled, and they declined to answer.

We are of opinion that the complaint states facts sufficient to constitute a cause of action. It states that the assessment was "upon that portion of the plaintiff's right of way herein described." The assessment concludes with the words of identification, "being the Southern California Railway right of way between Avenues 33 and 50." It was evidently the intention to assess and sell the right of way as described by metes and bounds in the assessment.

The statute in regard to assessments for the improvement of streets provides for an assessment upon the lots and lands fronting on the improved portion of the street. Section 7, Vrooman Act (Laws 1885, p. 147, as amended by Laws 1891, p. 196).

There is no authority for making an assessment upon a right of way, or for selling the same. A railroad is a quasi public corporation, in which the public is interested. It holds a franchise from the state, and must operate its road or forfeit its franchise. A part of its right of way cannot be

sold on execution or for a street assessment. The decisions are not in harmony on the question, but we think the best-considered cases hold that such right of way cannot be sold to satisfy a street assessment. In *C. & St. P. Ry. Co. v. City of Milwaukee*, 89 Wis. 509, 62 N. W. 419, 28 L. R. A. 249, the question is ably discussed, and the court said: "Whether the track and right of way of a railroad company is subject to assessment for local improvements on the ground of special benefits, under the language of statutes, couched in general terms, providing for such assessments, is a question upon which the courts have not been agreed. The system and policy of each state enter largely into the question, and give to it a local character. By the charter of Milwaukee, the improvement of Commerce street was chargeable to and payable by the lots fronting or abutting upon such street. * * * to the amount which such improvement shall be adjudged by the board of public works to benefit such lots; and an assessment of the amount is provided for, which, when confirmed by the council, its collection may be enforced in case of nonpayment by a sale and conveyance of the lots so assessed. City Charter (Laws 1874, pp. 359, 362, c. 184, subc. 7, §§ 2, 7). So much of the lots in question as were occupied by the tracks of the railroad and supporting banks, and used for right of way purposes, had been devoted and dedicated to uses in which the public had an important interest of a probable perpetual duration; and to enforce an assessment against such right of way and track, extending about half a mile in distance, by a sale and conveyance, would necessarily dismember and break up the entirety and utility of the road as a line of travel and commercial intercourse, and interfere with and impair the paramount interests which the public have in it for these purposes. The property of the corporation in its road and appurtenances essential to its operation and use, annexed to the franchise of the company to maintain and operate its road, is an entirety, and is thus charged, in the hands of the company, with an important trust in favor of the public, though the property in all other respects is essentially private, and operated for private gain. Public policy would seem to forbid a severance and segregation of its several special or particular parts, essential to the exercise of the franchises and the use and operation of the road by forced sale upon legal process or for an assessment."

In *L. N. A. & C. R. Co. v. Boney*, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435, the court said: "The other feature of the case presents a question of much greater difficulty. According to the established rule of the common law, which controls the current of modern authority, the franchises of a corporation—mere incorporeal hereditaments—were not subject to seizure and sale upon execution in the absence of express statutory provisions authorizing the sale and prescrib-

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ing the method of transfer. It follows as a natural sequence that lands, easements, or things essential to the existence of the corporation and the execution of its corporate duty, and without which its franchise would be of no practical use, cannot be levied upon and sold on execution at law, so as to detach them from the franchise, and thus destroy its use."

The Court of Appeals of Missouri, in *Sweaney v. K. C. R. Co.*, 54 Mo. App. 266, said: "The sole question is this: Does the law authorize the enforcement of a special tax bill for a street improvement against a detached right of way? * * * The tax bills in suit were issued on the theory that the land along the line of the graded street, and used by a railroad as its right of way, is chargeable with such local improvements, just as other adjacent property. This, too, is the position taken and so forcibly urged on us by plaintiff's counsel. But however cogent the argument, and however reasonable and just may be the position contended for, yet, under the repeated decisions of our Supreme Court in cases which we deem analogous, we must hold that plaintiff cannot maintain this suit, which has for its aim and purpose the carving out, sale, and conveyance of a portion only of defendant's right of way. Admitting the terms 'adjoining lands,' 'all the property on both sides,' etc., appearing in the Kansas City Charter, to be sufficiently general to embrace the railroad right of way, but even then we are met with the doctrine of our adjudicated cases that a lien will not be enforced against a mere fractional part of a railroad right of way, except it be specially authorized by the Legislature, in language not to be doubted." See *City of Philadelphia v. Philadelphia, W. & B. R. Co.*, 33 Pa. 41; *City of Allegheny v. Western Pa. R. Co.*, 138 Pa. 375, 21 Atl. 763; *Bridgeport v. N. Y. & N. H. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Detroit, G. H. & M. Ry. Co. v. City of Grand Rapids*, 106 Mich. 13, 63 N. W. 1007, 28 L. R. A. 793, 58 Am. St. Rep. 466.

It is not necessary to decide in this case as to whether or not the fee or reversion in the land can be assessed. After a right of way has been acquired by a railroad corporation by condemnation or otherwise, and its track laid upon it, we apprehend that it would be difficult to realize by a sale of the fee remaining in the grantor. But without deciding this question, it is sufficient to say that this proceeding is for the purpose of enjoining a sale of plaintiff's right of way; that is to say, its easement. The judgment is that the bond is void as a lien upon plaintiff's right of way, and that defendant be enjoined from selling "any part or portion of plaintiff's right of way in said complaint, and hereinafter described." If the defendants do not intend to sell the plaintiff's easement, but only the subordinate estate, the judgment is not in any way injurious to them. The restraining order is merged in the judgment, and the appeal therefrom may be dismissed.

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We therefore advise that the judgment be affirmed, and the appeal from the order dismissed.

We concur: HARRISON, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment is affirmed, and the appeal from the order dismissed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

LITTLE ROCK & H. S. W. R. CO. v. NEWMAN.

(Supreme Court of Arkansas, Nov. 5, 1904.)

[83 S. W. Rep. 653.]

Eminent Domain—Construction of Railroad near Property—General or Special Injuries.*

Where a railroad is constructed on streets near plaintiff's property, and intersects other streets leading to the property, which does not abut on the streets on which said road is constructed, and it is not shown that travel is diverted from the property, and access thereto is not obstructed, the injury thereto is not special, but is a general one, for which no recovery can be had.

Same—Same—Same.*

Injury caused to a country place owned by plaintiff by the fact that the railroad runs between it and a city is general, and not special.

Appeal from Circuit Court, Garland County; Alexander M. Duffie, Judge.

Action by Z. T. Raulston, revived in the name of H. C. Newman, administrator, against the Little Rock & Hot Springs Western Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Z. T. Raulston was the owner of certain town lots in the city of Hot Springs and a tract of land in the country upon which he lived. The defendant, the Little Rock & Hot Springs Western Railroad Company, constructed its railroad across Border street where it intersected with Valley street, and along Valley street across Grand avenue to where Valley street intersects with Market street, and also constructed a side track on a portion of Elm street. The property of Raulston does not abut on any portion of these streets where the railroad is built in the streets. A portion of his property is in the country, some distance from the tracks of the railroad above-referred to. One lot abuts on Grand avenue some hundred or two feet from where the railroad crosses that avenue on a level with the street; other of his lots abut on Hale street, which is not touched by the railroad; and three lots abut on Valley street some two blocks, or about six hundred feet, from where the railroad first touches that

*See foot-notes appended to *Dean v. Ann Arbor R. R.* (Mich.), 13 R. R. 365, 36 Am. & Eng. R. Cas., N. S., 365; *Stockdale v. Rio Grande Western Ry. Co.* (Utah), 12 R. R. E. 527, 35 Am. & Eng. R. Cas., N. S., 527.

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street. Raulston brought an action against the company to recover \$1,500 damages, which he alleges was caused to his property by reason of the fact that the defendant had constructed its tracks across and along the streets named. The company filed an answer, denying that plaintiff had been damaged, or that it was in any way liable for the injury alleged. On the trial the circuit court held that the proof did not show any injury to the land in the country, but submitted to the jury the question of injury to the town lots, which returned a verdict in favor of plaintiff for the sum of \$150. The defendant appealed. After the judgment below, the plaintiff died, and the action has been revived in the name of H. C. Newman, his administrator.

Dodge & Johnson, for appellant.

RIDDICK, J. (after stating the facts). This is an action by an owner of town lots in the city of Hot Springs against the defendant company to recover damages for an injury which plaintiff claims was caused to his property by the act of defendant in constructing its railroad along and across certain streets of the city. The rule of law governing cases of this kind is that no private action on account of an act obstructing a public and common right will lie for damages of the same kind as those sustained by the general public, even though the inconvenience and injury to the plaintiff be greater in degree than to other members of the public; but an action will lie for peculiar or special damage of a kind different from that suffered by the general public, even though such damage be small, or though it be not confined to plaintiff, but be suffered by many others. Note by Bennett to Fritz v. Hobson, 19 Am. Law Reg. 615-637; Hot Springs R. R. Co. v. Williamson, 45 Ark. 433. The rule seems to be well settled, and the trouble in deciding this class of cases comes in the application of it, and in determining what constitutes a special injury and what is not. In the case of Rickert v. Directors of Metropolitan Railway Company, L. R. 2 House of Lords, 175, where the majority of the judges were of the opinion that no cause of action was shown, Lord Westbury dissented, and delivered an opinion in which he maintained the right of the plaintiff to recover. In that opinion, after stating that he entirely concurred with the view that, in order to recover, the plaintiff must show, not a general injury, but a special damage, to the property owned by him, he undertook to illustrate the difference between a special and general damage. "Thus," he said, "if a public highway be diverted or crossed on a level by a railway, the inconvenience of having to wait whilst trains pass is common to all the public, and the benefit which it is considered results to the public from the railway is the only compensation. Persons dwelling in the neighborhood may sustain this inconvenience more frequently than the rest of the public; but, if the inconven-

ience is to be regarded as compensated by the public convenience, it cannot be converted into a ground for compensation by reason of certain persons having to sustain the inconvenience more frequently than the rest of their fellow subjects." Now, in this case none of plaintiff's property abutted on that part of the street upon which the tracks were constructed. The railroad did not block the streets upon which it was constructed, or prevent travel upon them. The access to plaintiff's property was not taken away, or rendered less convenient, though it is possible, as he claims, that by reason of the fact that one end of the street upon which some of his lots abutted was occupied by the railroad some travel was diverted from that end of the street upon which his property was located. But, notwithstanding the tracks of the company, the street, as before stated, is still open for travel and use by the public, and access to the property of plaintiff could be had not only by it, but by a number of other streets, some of which had been improved and rendered much more suitable for travel than the street on which the tracks were laid, even before the railroad was placed there. The evidence leaves it very doubtful as to whether this diversion of travel was occasioned by the railroad or by the improvement of other streets in the city which would naturally tend to deflect travel from an unimproved street, whether occupied by the tracks of a railroad or not. If a railroad is constructed across the highway leading from the home of one who lives in the country to the town or city to which his business requires that he must often go, it is very natural that he should feel that the danger of delay or accident to which he may thus be at times subjected renders his property less desirable as a home, while as a matter of fact its market value may be actually increased by the construction of the railroad. If he suffers an injury in such a case, it is general, and not special. If one owning a home in the country could recover damages in such a case, the man who owns a home in the city, and has often to visit the country, might, on the same principle, claim damages to his home in the city; and so there would be no end to such claims, for the injury is common to the whole public, whether in the town or country. It would be impracticable to allow damages in such cases, and so the law holds that no recovery can be had. The circuit court so decided in this case as to the place owned by the plaintiff in the country. But the evidence convinces us that the same rule must be applied to the town lots. The Supreme Court of Illinois, in discussing a claim for damages to property on account of the vacation of certain streets and alleys, said: "Here plaintiff's lot is not adjacent to the street and alleys vacated. It is in another block. The access and egress from his lot are not affected by the vacating ordinance passed by the city. The street in front and the alley in the rear of his property remain open as before,

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affording the same access to and egress from it. The inconvenience that would be occasioned to plaintiff in going from the street in front of his house to a particular part of the city on account of vacating and closing up certain streets and alleys in another block is of the same kind of damage that would be sustained by all persons in the city that might have occasion to go that way; and, although the inconvenience he may suffer may be greater in degree than to any other person, that fact would not give him a right of action." *City of East St. Louis v. O'Flynn*, 119 Ill. 204, 10 N. E. 397, 59 Am. Rep. 795. In a well-considered case recently decided by the Supreme Court of Michigan the same conclusion was reached that the plaintiff could recover no damages on account of the closing of a street upon which his property did not abut, and the closure of which did not affect the means of ingress and egress to his property. In that case the court said that "it cannot be doubted that there has been some resulting disadvantage occasioned by the closing of that portion of the street," but the court, after a full review of the authorities, held that the injury was not special to plaintiff, but one which he suffered in common with the general public, and that no recovery could be had. *Buhl v. Union Depot Co.*, 98 Mich. 596, 57 N. W. 829, 23 L. R. A. 392. The two cases referred to were much stronger in favor of the plaintiff than this case, for in those cases the streets were completely closed at the place of the obstruction. But here, as before stated, the streets along which the defendant constructed its tracks are still open for business, and used by the public as well as by the company.

In conclusion it seems to us that plaintiff failed to make out a case for any damages. It has been held that a mere diversion of travel is not sufficient to entitle one to damages. *Buhl v. Union Depot Co.*, 98 Mich. 599, 57 N. W. 829, 23 L. R. A. 392. But we need not discuss that point, for the evidence here falls short of showing that defendant caused any diversion of travel from the street on which the property of plaintiff was located. It seems to us a matter of pure conjecture as to whether the diversion complained of was caused by the act of defendant or by the act of the city in improving certain other streets and making them more suitable for travel than the one upon which the store and other property of plaintiff was located. But if any inconvenience or injury was sustained, it was, as before stated, not special, but of the kind suffered by the public in general, and for which no recovery can be had.

Judgment reversed, and cause remanded for new trial.

YAZOO & M. V. R. CO. *v.* HARRINGTON.

(Supreme Court of Mississippi, March 5, 1905.)

[37 So. Rep. 1016.]

Cattle Guards—Compliance with Statute.*

Rev. Code 1892, § 3561, makes it the duty of railroad companies to maintain proper cattle guards where their tracks pass through inclosed land: *held*, that a specified pattern of a surface cattle guard cannot be judicially declared to be a compliance with the section because it is less dangerous to the traveling public than the pit guard, though it may be less effective in turning cattle.

Same—Constitutionality of Statute.†

Rev. Code 1892, § 3561, requiring railroad companies to maintain cattle guards where tracks pass through inclosed land, being a legitimate exercise of the police power of the state, is not violative of Const. U. S. Amend. 14, as depriving such companies of their property without due process of law.

Appeal from Circuit Court, Coahoma County; Sam C. Cook, Judge.

"To be officially reported."

Action by J. L. Harrington against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was a suit to recover damages to crops by the trespassing of stock, which passed over an alleged defective stock gap maintained on defendant's right of way at the point where the railroad entered plaintiff's inclosed lands; and in addition he also sued for the statutory penalty of \$250 under section 3561 of the Code of 1892. The case was tried in the lower court on agreed statement of the facts, before the judge, a jury having been waived. From a judgment for plaintiff for \$850, defendant appeals.

It was agreed as follows: That at the points of entrance and exit to plaintiff's inclosed lands by the tracks of defendant's railroad the defendant had put in a Ross surface stock gap and cattle guard, which at the time of the injuries complained of were free from defects of construction and were in good condition and in proper repair; that said Ross stock gap or cattle guard is equal to any other surface cattle guard now in use by railroads, and is up to the highest standard of surface cattle guards used in the operation of railroads; that, over these surface stock gaps or cattle guards, stock, at different times, passed into plaintiff's inclosed land and upon his inclosed lands as described in his declaration, and committed injuries to his crops and lands as sued for; that the defendant and other leading railroads of the country are abandoning the old pit guard and replacing them with Ross cattle guards, or some other surface guard of equal effective-

*See foot-note appended to *Campbell v. Iowa Cent. R. Co.* (Iowa), 12 R. R. R. 601, 35 Am. & Eng. R. Cas., N. S., 601.

†See foot-note appended to *Sanger v. Chesapeake & O. Ry. Co.* (Va.), 13 R. R. R. 482, 36 Am. & Eng. R. Cas., N. S., 482.

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ness, for the reason that experience in operating railroads has demonstrated that the surface cattle guard in use by defendant, while not as effective in turning stock, insures safety to the lives and limbs of the traveling public. In connection with the agreed state of facts, and as part of same, some affidavits were incorporated, given by experts, to the effect that the surface cattle guards are not as effective in turning stock as the pit guard; that the pit guard is being abandoned by leading railroads because it is dangerous to the trains as compared with the surface guards, and has the tendency to imperil the lives of passengers and employees by derailments. It was further agreed that, if the court should decide in favor of plaintiff, judgment was to be rendered for him for \$850.

It was stipulated in the agreement that the questions presented for decision were two: (1) whether or not the Ross surface cattle guard is not a necessary and proper cattle guard, within the true meaning of section 3561 of the Code of 1892. (2) If not a compliance with that section, whether or not said section is violative of the fourteenth amendment to the Constitution of the United States, in that said section deprives the defendant of its property without due process of law—defendant's contention being that under the facts a necessary and proper cattle guard, within the purview of said section, is one that insures the safety of lives and limbs of the traveling public, although the same might not be as effective in turning stock as the pit guard; that to use the pit guard, which is more effective, but more dangerous to the lives and limbs of the traveling public, is not intended by said section, and, if that is true, then the same is a violation of the fourteenth amendment to the Constitution of the United States, in that it deprives the defendant of its property without due process of law. Defendant's motion for a new trial was overruled, and it appeals.

Mages & Longstreet, for appellant.

J. W. Cutrer, for appellee.

WHITFIELD, C. J. The primary object of section 3561 of the Code of 1892 is to protect the farmers of this state from the depredations of cattle entering over the railroad right of way, and this primary object must be the polestar of construction in determining its purpose. We have held, and again reaffirm the doctrine, that the object of the section was not only to protect farmer's crops, but to secure the safety of the traveling public. Because, in this particular instance, the Ross cattle guard is perfect of its kind, this court is not to decree its use a perfect defense to suits for damages by trespassing stock. The kind may not be reasonably effective to keep out stock—not a perfect kind of cattle guard. The argument is that though this surface cattle guard is ineffective to keep out stock, yet, because it is less dangerous to the

traveling public than the pit cattle guard, this Ross cattle guard, if perfectly constructed, must be judicially declared a compliance with section 3561, whose fundamental purpose is the safety of crops. This is an easily demonstrable fallacy. Pursue the contention to its logical result, and what do we have as the conclusion? Why, that since the Ross and other surface cattle guards, though ineffective to shut out cattle, better conserve the safety of the traveling public than the pit guard, therefore no cattle guard at all is best, since none at all least interferes with the safety of the traveling public. Or, to put it in syllogistic form: Major premise: The safety of the traveling public is the supreme concern. Minor premise: The Ross surface cattle guard, if ineffective against cattle, best secures the safety of the traveling public. Conclusion: Therefore, a Ross cattle guard complies with section 3561. Or, ergo, a cattle guard which secures the safety of the traveling public in the highest degree is the proper one under section 3561, even though the least effective against cattle, or not effective at all. From which it is an easy step to the conclusion, that a plain track, uninterfered with at all, is the best cattle guard of all. This no one can fail to see would be a direct nullification of the primary object of the section, and is of course wholly inadmissible. On the contrary, it would be equally absurd to hold that a cattle guard which was perfect against cattle is a proper one, although it constantly resulted in loss of life by derailment of trains. Not here, more than anywhere else, is the solution of vexed questions to be found by running out opposite theories to extreme conclusions. We must administer the law as a practical science coming home to the "business and bosoms of men," not as a set of speculative theories intended for the exercise of a discursive fancy. The proper cattle guard must consult the safety of the traveling public, certainly; and just as certainly must it keep out stock. The proper cattle guard requires that it be so constructed as best to combine these objects; so as, whilst being reasonably effective against stock, it shall also be reasonably preservative of the safety of the traveling public.

As to the second branch of the argument, it is enough to say that section 3561 is a legitimate exercise of the police power of the state; and hence the fourteenth amendment to the Constitution of the United States is not involved. This is settled by many decisions of the United States Supreme Court admirably grouped by appellee's counsel, among which we specially refer to *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *N. Y. & N. E. R. R. Co. v. Bristol*, 151 U. S. 571, 14 Sup. Ct. 437, 38 L. Ed. 269; *Davidson v. N. O.*, 96 U. S. 104, 24 L. Ed. 616; *R. R. Co. v. Humes*, 115 U. S. 520, 6 Sup. Ct. 110, 29 L. Ed. 463; and *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702.

Union Traction Co. *v.* Basey

The public convenience, as well as the public safety, health, and morals, is within the sweep of the police power. That power is to organized government what the atmosphere is to man—"its vital breath, its native air." It penetrates, permeates, pervades all, in its omnifically healing reach—"broad and general as the casing air." It is the oil in which the machinery of government efficiently moves.

Affirmed.

UNION TRACTION CO. OF INDIANA *v.* BASEY et al.

(Supreme Court of Indiana, Feb. 16, 1905.)

[73 N. E. Rep. 263.]

Condemnation Proceedings—Damages—Appeal—Effect of Consolidation.*

Where, pending a proceeding to condemn land for a street railway right of way, petitioner was consolidated with another company, which succeeded to all petitioner's rights, titles, and estates in and to the subject of the litigation, the latter company was entitled, on averring such facts, to prosecute an appeal in its own name from the award of damages.

Same—Same—Voluntary Payment—Estoppel.

Where a traction company paid to the clerk of the court the amount assessed as damages for land to be appropriated by it, and took possession thereof as authorized by Burns' Ann. St. 1901, § 5468c, such payment was not voluntary in a legal sense, so as to estop the railway company from prosecuting an appeal from the award.

Appeal from Circuit Court, Hamilton County; J. F. Neal, Judge.

Condemnation proceeding by the Indianapolis Northern Traction Company against Martin V. Basey and others. From an order overruling a demurrer to defendants' answer and dismissing the appeal of the Union Traction Company, it appeals. Reversed.

This cause was transferred from the Appellate Court under section 1337u, Burns' Ann. St. 1901.

W. S. Christian and A. W. Brady, for appellant.
Stuart & Reagan, for appellees.

MONTGOMERY, J. This proceeding was commenced in the court below by the Indianapolis Northern Traction Company to appropriate a right of way across lands owned by appellees. Appellees' damages were duly appraised and assessed, and an exception to the award saved by the traction company. The company paid to the clerk of the court the damages so assessed, and took immediate possession of the land appropriated. Appellees, by way of answer to the

*As to the effect of consolidation on the rights and liabilities of railroad companies, see foot-note appended to *Commonwealth v. Buffalo, R. & P. Ry. Co.* (Pa.), 10 R. R. 160, 33 Am. & Eng. R. Cas., N. S., 160.

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exception to the award, set up the payment of the damages and possession by the company. A demurrer to this answer, and a motion to strike it out, were overruled, and exceptions saved; and, the company declining to plead further, the appeal upon exceptions to the award was dismissed, over the objection and exception of the company.

Appellees insist that as the Union Traction Company was not a party to the judgment, it has no right of appeal, and that this appeal should be dismissed. In the assignment of errors appellant alleges, "that it is a street railroad corporation of the state of Indiana, created by consolidation of Indianapolis Northern Traction Company, named in the within judgment and proceedings, and Union Traction Company of Indiana, both street railroad corporations of the state of Indiana, and by virtue of such consolidation has succeeded to all rights, titles, and estates of said Indianapolis Northern Traction Company in and to the subject-matter of said judgment and proceedings."

The assignment of errors in this court is in the nature of a complaint, and may be met by "pleas, answers, demurrers, and motions." *Newman et al. v. Kiser*, 128 Ind. 259, 26 N. E. 1006. When a party prosecuting an appeal has become privy to a judgment by operation of law, as an executor, guardian, or heir, such appeal must be prosecuted in his own name, and, by proper averment, the master which makes him privy and entitles him to maintain the action should be spread upon the record. *Rundles v. Jones*, 3 Ind. 35. This has been done by the averments of the assignment of errors above set out. The statute upon the general subject of pleadings provides that the character and capacity in which a party sues shall require no proof, unless such character or capacity be denied by a pleading under oath. No special denial of appellant's right to prosecute this appeal in the capacity claimed by it having been filed, the averments of the assignment of errors showing a consolidation of two corporations under the laws of this state will be taken as true, and in consequence thereof appellant, as a matter of law, by such consolidation succeeded to the rights of the constituent corporations, and is the proper party to prosecute this appeal.

The question to be determined in this case is whether a street railroad company, in the exercise of the power of eminent domain under section 5468e, Burns' Ann. St. 1901, by paying to the clerk of the court the amount assessed as damages for land to be appropriated by it and taking possession, is thereby estopped from prosecuting an appeal upon its exceptions duly taken to such award. Section 5468e, supra, is in substance the same as section 5160 Burns' Ann. St. 1901, which is a part of the general railroad act. Section 5160, supra, was recently construed by this court with regard to the exact point now in question. *Cleveland, C. & St. L. Ry. Co. v. Nowlin* (Ind.) 72 N. E. 257. The authorities

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cited, and the reasoning of the opinion in that case, are alike applicable to the question now under consideration, and make repetition unnecessary. We accordingly hold that when a street railroad company appeals from an award within the 10 days allowed, and pays the award to the clerk of the court for the purpose of entering at once upon the property described in the instrument of appropriation, such payment is not voluntary in a legal sense, and will not estop the company from prosecuting its appeal. The circuit court erred in overruling the demurrer to appellees' answer, and in dismissing the appeal.

The judgment is reversed, with directions to sustain the demurrer to appellees' answer, and for further proceedings in harmony with this opinion.

SMITH v. SOUTHERN PAC. R. CO.

(Supreme Court of California, Feb. 1, 1905.)

[79 Pac. Rep. 868.]

Railroads—Construction Along Street—Damages to Abutting Owner.*

Damages special and peculiar to an abutting owner, authorizing recovery by him, may be caused by the construction of a railroad in a highway on his side of the street, and close to his property, though the rails are flush with the surface of the street, and the construction works no change of grade.

Department 2. Appeal from Superior Court, Santa Barbara County; William S. Day, Judge.

Action by W. F. Smith against the Southern Pacific Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Canfield & Starbuck, for appellant.

Richards & Carrier, for respondent.

McFARLAND, J. This is an action to recover damages alleged to have been caused to certain land and premises of plaintiff by the construction and maintenance by defendant of a steam railroad along the public road or street upon which plaintiff's land abuts. The jury returned a verdict for plaintiff in the sum of \$350, and a judgment was rendered accordingly. Defendant appeals from the judgment, and brings up the evidence and rulings of the court in a bill of exceptions.

The main facts are these: Wallace avenue is a public highway in Santa Barbara county. It runs through the town of Summerland, and that part of it which lies within the town

*See foot-notes appended to *Dean v. Ann Arbor R. R.* (Mich.), 13 R. R. R. 365, 36 Am. & Eng. R. Cas., N. S., 365; *Stockdale v. Rio Grande Western Ry. Co.* (Utah), 12 R. R. R. 527, 35 Am. & Eng. R. Cas., N. S., 527.

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constitutes the principal street of said town. Plaintiff owns lots in the town abutting on said highways or street, and having a frontage thereon of 100 feet. The street lies on the south side of plaintiff's lots. About June, 1891, defendant constructed, and since then has maintained, along said street, a railroad track, upon which it operates a steam railroad; having been granted the right of way therefor by the board of supervisors. A part of this railroad runs along the entire frontage of plaintiff's lots, upon which he has a dwelling house and other buildings. The lots are on a level with the street, and the construction of the railroad does not change the grade of the street. The rails are flush with the surface of the street. The track in front of plaintiff's lots is constructed entirely on the north half of the street—the side next plaintiff's lots. It runs diagonally along the street at an angle to the front line of plaintiff's lots, and is nearer that line on the southwest corner of his lots than on the southeast corner. At the southwest corner the ends of the ties of the railroad are 10 feet from plaintiff's line, and on the northeast corner between 12 and 13 feet. The street is 60 feet wide. One of defendant's witnesses said: "I don't think it would be possible for a man crossing with a team up to Mr. Smith's place to hitch in front of his two western lots. Opposite the eastern lots he might, but it might not be a desirable place to hitch, though." The amount of damage found by the jury was fully sustained by the evidence, provided such damage was not *damnum absque injuria*. There are some other facts in the case which are commented on by counsel, but, in our opinion, they are not important.

The general principle applicable to a case like the one at bar is that, when a railroad is constructed and maintained along a highway in front of a man's land, the latter may recover damages of the railroad company for such destruction or impairment of his rights and easements in the public highway caused by the railroad as constitute damage peculiar to himself, and independent of such damage as he sustains in common with the public, but cannot recover damages for those general inconveniences which he is subjected to in common with the public. In the case at bar the contention of appellant for a reversal seems to rest on the proposition that because the rails of the track were flush with the surface of the ground, and the construction of the railroad track did not cause any change of grade, or compel respondent to go either up or down in getting from his land to the street, therefore, as a matter of law, respondent could not have suffered from its construction any damage peculiar to himself, and different from that felt or sustained by the public. But we do not think that this proposition is maintainable. We cannot say that, as a matter of law, the construction of the railroad so near the line of respondent's lots as to cause him inconvenience and obstacles spoken of by the witnesses,

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above mentioned, as well as other obstacles to the enjoyment of said lots that could readily be suggested, does not cause damage peculiar to respondent, and different from that suffered generally by the public. It is not a sufficient answer to say that it was necessary for appellant to build its track gradually across the street, and therefore to put part of it close to respondent's line. Whatever appellant's necessities were in the premises, if what it actually did caused special and peculiar damage to respondent, it is liable for such damage.

The judgment is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

KRUEGER v. ST. LOUIS, ST. C. & W. R. CO.

(Supreme Court of Missouri, Division No. 1, Dec. 22, 1904.)

[84 S. W. Rep. 898.]

Right of Way—Construction of Deed—Covenant or Condition.*

Plaintiff conveyed a strip of land for a railroad right of way on condition that the grantee "shall construct and maintain a * * * railroad to be operated by electricity for motive power, * * * and upon the failure or abandonment of said enterprise by the grantee * * * the privileges herein and the property hereby conveyed, shall revert to and be fully vested in the grantors, * * * and conditioned also that the construction of such road be fully completed and such road be in operation in or before the year 1900:" *held*, that the clause requiring the road to be finished before or during the year 1900 was a covenant, and not a condition, and a failure to complete the road within that time did not operate as a forfeiture of the right of way.

Appeal from St. Louis Circuit Court; Jno. W. McElhinney, Judge.

Action in ejectment by Frederick Krueger against the St. Louis, St. Charles & Western Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Douglas W. Robert, for appellant.

C. & C. J. Daudt, for respondent.

VALLIANT, J. This is an action in ejectment for a strip of land 25 feet wide along the boundary line of plaintiff's farm, containing about 1½ acres. It is occupied by defendant corporation as a railroad. Defendant answered by general denial and a plea of estoppel, to the effect that it constructed its railroad through the strip of land in suit with the assurance on the part of plaintiff that he did not intend to prevent the building of the road, and that he told the defendant to proceed with the construction. Reply, general denial.

*For the authorities in this series on the subject of the forfeitures of railroad right of way for failure to comply with terms of grant, see foot-note appended to *Peterson v. Atlantic & B. R. Co. (Ga.)*, 12 R. R. R. 579, 35 Am. & Eng. R. Cas., N. S., 579.

The following facts are undisputed: Defendant is a railroad corporation owning an electric railroad extending from Wellston, a suburb of St. Louis, through St. Louis county, to a point on the Missouri opposite the city of St. Charles. Plaintiff's farm is about two miles from the Missouri river. On April 5, 1899, the building of this railroad being then contemplated, the plaintiff and his wife executed a deed conveying to one Houseman the strip of land in question, along the border of his farm, for a right of way for this railroad that was to be built. It was expressed in the deed that in consideration of "the sum of one dollar to said parties of the first part paid by said party of the second part, receipt of which is hereby acknowledged, and in further consideration of the conditions, covenants and agreements hereinafter mentioned and contained the said parties of the first part do hereby grant, bargain, sell, convey and confirm unto said party of the second part, his successors and assigns a right of way for railroad purposes only, over, through and along a strip of ground twenty-five feet wide [then follows a description of the strip conveyed], upon condition, however, that the grantee herein, his successors and assigns, shall construct and maintain a single or double track railroad to be operated by electricity for motive power, or by such other approved power as may be adopted by the grantee or assigns, and upon the failure or abandonment of said enterprise by the grantee herein, or his successors and assigns, the privileges herein and the property hereby conveyed, shall revert to and be fully vested in the grantors, their legal representatives or assigns, and conditioned also that the construction of such road be fully completed and such road be in operation in or before the year 1900." Houseman conveyed to the defendant, who built the road. It was finished in the summer or fall of 1901.

As to the remaining facts in the case the evidence is somewhat conflicting. On the part of defendant it tended to prove that in October, 1900, the construction of the road having reached Pattonville, which was three or four miles east of plaintiff's farm, Houseman, acting for the railroad company, seeing that it would not be possible to complete the road in 1900, went to the plaintiff and asked him to give a deed extending the time; that plaintiff was himself willing to do so, but he said that, as his wife objected, he would not do it, but he said: "You go ahead, Mr. Houseman. You have got a deed, and I will never interfere with you." The plaintiff, in rebuttal, denies that he said that.

On February 9, 1901, a notice in writing, to which the plaintiff's name was signed by his attorney, was served on the defendant, which was as follows:

"To the St. Louis, St. Charles and Western Railroad Co.: Take notice that the undersigned Friedrich Krueger, by my certain deed dated April 5th, 1899, and recorded in the re-

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corder's office of St. Louis County, Mo., in Book 110 at page 516 thereof, to which deed reference is hereby made, conveyed to James D. Houseman, Jr., a right of way for railroad purposes only over a strip of ground twenty-five feet wide and along the northern boundary line of my tract of land in U. S. Survey 131, Township 46 and 47, Range 5 east, upon condition that said grantee or his assigns should construct and maintain a certain electrical railroad.

"That said deed was made upon the express condition contained therein, 'that upon the failure or abandonment of said railroad enterprise by the grantee or his successors and assigns, that the privileges and the property conveyed by said deed shall revert to and be fully vested in the grantor, and conditioned further that the construction of said railroad be fully completed and such road be in operation in or before 1900.

"And, whereas, you, the St. Louis, St. Charles and Western Railroad Company, claim to be the assignee and successor of said James D. Houseman, Jr., by virtue of a deed made to you by said Houseman.

"And, whereas, you and the said Houseman have failed to comply with the conditions and covenants contained in my deed aforesaid and have failed to fully complete the construction of said road and to have such road in operation in or before the year 1900, I hereby notify you that under the terms of said deed I declare the privileges therein mentioned and the property thereby conveyed to have reverted to me and to be fully vested in me and the said conveyance to said Houseman to be of no force and effect.

"You are further notified that our engineers and employees, in locating the right of way purchased by you from one Fred Lueck, who adjoins me on the north, have encroached upon the tract owned by me by placing the center stakes of your right of way on my land, thus moving the boundary line a distance of about six feet on my ground at the corner of my tract of land; that the true boundary line between my land and that of Fred Lueck is plainly indicated by rocks planted at both ends of said line, and that I have cultivated my ground to said line for many years, and that the line of my present possession still extends to said line marked by said rocks. I therefore notify you not to enter upon any of my land without my knowledge or consent.

"Friedrich Krueger,

"By C. Daudt, his Attorney."

"St. Louis County, Mo., February 6th, 1901."

The defendant's testimony was to the effect that the work on this strip of land was begun in January, and continued through January and February, 1901.

The evidence on both sides was to the effect the plaintiff saw the work of constructing the road going on through his land, and saw and talked with the contractor, but never ordered

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him off or objected to his proceeding with the work. On one occasion he came on the scene, and discovered that the contractor had encroached beyond the 25-foot strip, and called his attention to it; and he and the contractor together measured the ground, and, the measurement showing that the plaintiff was correct, the contractor altered his lines and came within the strip in question.

At the close of the plaintiff's evidence the defendant asked an instruction to the effect that the verdict should be for the defendant, but the court refused the instruction, and defendant excepted. The cause was submitted to the jury under instructions at the request of the plaintiff to the effect that, if the railroad was not completed during the year 1900, the plaintiff was entitled to recover, unless they should find for the defendant on the plea of estoppel, as defined in other instructions. There was a verdict for the plaintiff, and judgment accordingly for possession of the land and \$116.50 damages, and \$3.50 monthly rentals. The plaintiff afterward entered a remittitur reducing the rental value to 30 cents a month. Then the court overruled the defendant's motion for a new trial, and defendant appealed.

The foundation of the plaintiff's claim is in his interpretation of the deed made by himself and wife to Houseman. The words in the deed relied on are "and conditioned also that the construction of such road be fully completed and such road be in operation in or before the year 1900." Those words the plaintiff contends constitute a condition subsequent, the nonperformance of which by defendant vacates the grant. In construing a deed the main guide is the intention of the parties, just as in construing a will it is the intention of the testator that must control. That intention must be gathered from the face of the whole deed, in the light of the circumstances in which the parties were at the time they executed it; and, if that intention clearly appears, it will be declared as the effect of the deed, even if words not altogether apt are used to express it. We take from the brief of the learned counsel for the plaintiff the following well-chosen quotations: "An estate upon condition is one which has a qualification annexed, by which, on the happening of a particular event, it may be created, enlarged, or destroyed. * * * If it allows the estate to vest, and then to be defeated in consequence of nonperformance of the requirement, it is a condition subsequent. 2 Bl. Com. c. 10; 4 Kent's Com., etc.; Shep. Touch. c. 6, 'Of Conditions.' The author of the Touchstone says: 'Conditions annexed to estates are sometimes so placed and confounded amongst covenants—sometimes so ambiguously drawn—and at all times have in the drawing so much affinity with limitations, that it is hard to discern and distinguish them.'"

What was the purpose of this deed? What was the motive that led to its execution? What was the consideration? The

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plaintiff owned a farm lying two miles from the Missouri River. The defendant was proposing to build an electric railroad from St. Louis to St. Charles, passing through, on the border of, plaintiff's land, thus putting him in convenient reach of both those cities. Defendant applies to plaintiff for the right of way for its railroad through his land, and this deed was given. The only money consideration mentioned is \$1, which was certainly not the only or the real consideration, for we cannot imagine the plaintiff being moved by the tender of \$1 to sell to a stranger, from whom he was to expect nothing else, a strip of his land 25 feet wide along his whole border. The deed says it was given in consideration of \$1, "and in further consideration of the conditions, covenants and agreements hereinafter mentioned." The deed therefore calls not only for \$1, but for conditions, also; and not only for conditions, also, but for covenants and agreements besides. And when the plaintiff's attorney wrote the formal notice to the defendant declaring the deed to Houseman of no force and effect, he, too, understood that the deed contained covenants as well as conditions. In the first paragraph of the notice only one condition is mentioned, and it is there said that the deed was given on that condition, which was that the grantee or his assigns should construct and maintain a railroad on the land. In the next paragraph of the notice the writer quotes from the deed the only words that expressly provide for a reversion of the title, which are that "upon the failure or abandonment of said railroad enterprise" the title is to revert. The words following the clause, "and conditioned further that the construction of said railroad be fully completed and such road be in operation in or before 1900," have no words of penalty or forfeiture attached or referable to them. Then the writer of the notice proceeds to say: "And, whereas, you and the said Houseman have failed to comply with the conditions and covenants contained in my deed," etc. The act mentioned in the notice as constituting the failure complained of was in not completing the road during the year 1900. Whether that was a failure to perform a condition or to keep a covenant, the notice does not say. And although the notice says that the deed contained covenants as well as conditions, and whilst it points to one condition, for the failure of which it is expressly provided that the title shall revert, it does not point to a single covenant, unless the obligation to finish the road in the time named is so intended. Words expressly authorizing re-entry are not always necessary when it clearly appears from the deed that the grant is on a condition to be performed, but when such words are used they assist in making clear the meaning of the whole instrument. The deed says the land is given for one purpose only—that is, the building and maintaining the railroad—and it says

that upon the failure of that purpose the land is to revert. Perhaps those words of forfeiture were unnecessary—perhaps, if the railroad enterprise had been abandoned, the estate granted would have reverted without those words; but, by applying them in that connection, and omitting to apply them in connection with the clause next following, the parties show that they did not understand that failure to complete the road in the given time should be as disastrous as failure to build it at all. The whole sentence is as follows: "Upon condition, however, that the grantee herein, his successors and assigns, shall construct and maintain a single or double track railroad to be operated by electricity for motive power, or by such other approved power as may be adopted by the grantee or assigns, and upon the failure or abandonment of said enterprise by the grantee herein, or his successors and assigns, the privileges herein and the property hereby conveyed, shall revert to and be fully vested in the grantors, their legal representatives or assigns, and conditioned also that the construction of such road be fully completed and such road be in operation in or before the year 1900." There is no meaning in the first clause of that sentence if the last clause is to have the effect contended for by respondent. What is the wisdom of saying in the first part of the sentence that if the road is never built the title shall revert, if it was intended to say in the last part of the same sentence that if it was not built within the ensuing year the title was to revert? If the plaintiff's interpretation of the deed is correct, the conditions could as well and with more clearness have been expressed in this form: "If the road is not built within the ensuing year the title is to revert, and further more if the road is never built the title is to revert." The main purpose of the plaintiff in giving this deed—the real consideration that moved him—was the convenient railroad connection it would give him with St. Louis and St. Charles, and other points in his neighborhood. That he has obtained. If we should now say that this deed means that, notwithstanding the road is completed and in full operation, yet the plaintiff may have his land back, or dictate to the railroad company the terms of a new sale, we would be giving to it the character of a very remarkable instrument—one which we are satisfied neither party to it had in mind when it was made. The only way in which force and meaning can be given to both clauses is to call one a condition, and the other a covenant. We hold that the clause requiring the road to be finished before or during the year 1900 was a covenant, and not a condition. This is in harmony with the previous ruling of this court on this subject. *Ellis v. Kyger*, 90 Mo. 600, 3 S. W. 23; *O'Brien v. Wagner*, 94 Mo. 93, 7 S. W. 19, 4 Am. St. Rep. 362; *Morrill v. Ry.*, 96 Mo. 174, 9 S. W. 657; *Studdard v. Wells*, 120 Mo. 25, 25 S. W. 201; *Roberts v.*

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Crume, 173 Mo., loc. cit. 581, 73 S. W. 662. The facts of this case are very similar to those in Gratz v. Highland Scenic Ry. Co., 165 Mo. 211, 65 S. W. 223.

The conclusion on this point makes it unnecessary to go into the question of estoppel pleaded in the answer. The plaintiff, on his own showing, was not entitled to recover.

The judgment is reversed. All concur, except ROBINSON, J., absent.

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(Supreme Court of Mississippi, Feb. 20, 1905.)

[37 So. Rep. 939.]

Anti-Trust Statutes—Construction—Violation of Public Policy—Tests.

In construing anti-trust statutes the nature of the business contemplated by the contract and the tendency of the contract as affecting the public, rather than the parties to the contract, whether corporations or individuals, are to be considered in determining whether it violates public policy.

Same—Police Power of State.

The state, in the exercise of its reserve police power, may restrict the power of corporations to contract within certain prescribed limits, and such police power cannot be so abridged or construed as to permit corporations to so conduct their business as to infringe upon the rights of individuals or the general well-being of the state.

Trusts—What Are—Tests.

Const. 1890, § 198, requires the Legislature to enact laws to prevent trusts, combinations, and agreements inimical to the public welfare. Code 1892, § 4437, defines a trust as a combination or agreement between two or more persons, corporations, or firms to, inter alia, place the control of business or the products or earnings thereof in the power of trustees, or to delegate the control and management of the business of the combining or contracting parties to any other persons than themselves and their proper agents and employees. After having enumerated the various kinds of contracts which it denominates trusts, the section declares them inimical to the public welfare and criminal conspiracies. Acts 1900, p. 125, c. 88, entitled "An act to define trusts, to provide for their suppression, and to preserve to the public the benefits arising from competition," defines trusts, prohibits contracts in restraint of trade, forbids corporations to issue or hold certificates of stock of trusts, and substantially re-enacts the definition cited from the Code of 1892.

Held, that not all combinations or contracts, without regard to their purpose, intent, or effect, by which the control of business is placed within the power of trustees or persons other than the contracting parties, are trusts within the statute, but the tests of a trust, and the essential to its existence, is that the contract or combination be, on account of its actual result, obnoxious to public policy, or be, in itself and in its necessary effect, inimical to the public welfare.

Same—Same—Same.

Courts will look through the form of an association in order to ascertain its character, and will judge of its nature not merely by its promulgated rules, but by its actual operation, and will decide the question of its legality or illegality according to the true nature and probable effect of the arrangement, without special regard to the form which has been assumed in the particular instance.

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Combinations—Legality.

If the form of a combination is legal, and its aim and purposes such as the law will uphold, it will not be denounced as illegal from the fact alone that the objects for which it was entered into are occasionally effected by rules which are only invoked as it becomes necessary to cope with unforeseen contingencies as they arise.

Trusts—Legality of Agreement.

Where a contract or understanding is not of itself inimical to the public welfare or in contravention of express statute, it will be upheld unless it is so operated as to become oppressive by infringing upon the rights of private individuals, or unless it works to the detriment of the general public.

Car Service Association—Legality of Rule—Failure to Pay Charges—Withholding Car Service.

A rule of a car service association, providing that where consignees refuse to pay, or unnecessarily defer settlement of, car service charges, cars will not be switched to the private sidings of such persons, but deliveries will only be made on public delivery tracks of the company, is legal and enforceable.

Demurrage—Refusal to Pay—Excuse—Claim against Railroad.

The fact that a consignee has an unadjusted claim for damages against a railroad is no valid excuse for his refusal to pay demurrage on cars unduly detained by him.

Trusts—Car Service Association—Tests of Legality of Combination.

Where an order of a car service association is reasonable in its general tenor and effect, the question whether it was rightfully invoked in a particular instance does not affect the question of whether the association is or is not a trust or combine.

Charges for Extra Services Rendered after Arrival of Freight.*

Railroads are entitled to charge and receive extra compensation for extra service rendered after the arrival of freight at its destination, such as reconsignment charges, car service or switching charges, demurrage, and the like.

Combinations—Legality.

An agreement, lawful in its character and purpose, is not rendered unlawful because some of its members attempt to put it to an unlawful use.

Car Service Association—Refusal to Recognize—Right to Withhold Car Service.

A rule of the Railroad Commission forbids railroads to discriminate in demurrage rates, and requires them to collect demurrage at all places on their lines if they collect at any place. The operation of the rule is to be suspended by the commission when Justice demands. Other rules of the commission regulate car service associations. Prior to the promulgation of the later set of rules, a car service association had a rule providing for the withdrawal of service on private sidings in case of the failure of consignees to promptly settle bills for car service charges: *held*, that where a consignee refused to recognize the car service association, and refused to pay car service or demurrage, the withdrawal of car service on his siding by the car service association did not constitute such oppressive and arbitrary action as to constitute the car service association an illegal trust and combine or criminal conspiracy inimical to the public welfare.

Same—Legality of Combination—Statutes.

The fact of the enactment of Act 1898, p. 97, c. 82, making car service associations subject to the control and supervision of the Railroad Commission, is indicative of a legislative intent that such associations shall not be deemed within the inhibition of Code 1892, § 4437, defining

*As to the right to impose demurrage charges, see foot-note appended to *New Orleans & N. E. R. Co. v. George & Co. (Miss.)*, 9 R. R. R. 786, 32 Am. & Eng. R. Cas., N. S., 786.

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trusts, and declaring them illegal, or of Acts 1900, p. 125, c. 88, which accomplishes the same purpose.

Same—Charges—Discrimination—Damage—Statute.

Under Acts 1900, p. 128, c. 88, § 7, providing that proof that a party has been compelled to pay more for services by reason of the unlawful act or agreement of a trust than he would have been compelled to pay except for such unlawful act or agreement shall be conclusive proof of damage, mere proof that one has been compelled to pay more for a service than his competitors were paying for the same service, without proof that such excessive payment was due to the alleged wrongful act and agreement complained of, does not constitute the required proof of damage.

Same—Trust—Statute.

A car service association, which is merely the agent of different railroads in the enforcement of car service and demurrage charges, and which is not only without power to control the railroads intrusting their business to it, but cannot even fix the demurrage charges which it is its duty to assess, is not an illegal trust or combine, within the prohibition of Acts 1900, p. 125, c. 88, defining such trusts as combinations or agreements by which any other persons than the contracting parties and their proper officers or employees shall have the power to conduct the control and management of their business.

Demurrage—Validity of Rules in Bills of Lading.

Rules contained in bills of lading, imposing demurrage for dilatory unloading of cars, are binding upon consignees, though they be in fact ignorant of their existence.

Right to Refuse to Switch Cars—Refusal to Pay Demurrage Charges.

While it is the duty of a railroad to switch and place cars coming from its own line, or tendered to it with proper transfer switching charges by any connecting line, and it cannot excuse itself from the performance of its duty by the existence of disputes as to the correctness of charges withheld pending adjustment, yet it is warranted in refusing to switch and place cars at the warehouse of a consignee, who has not only arbitrarily refused to pay demurrage charges accrued in the past, but has expressed his intention of persisting in his refusal even if such charges be justly incurred in the future.

Demurrage—Validity of Rule.

A car service rule requiring prompt payment of demurrage charges and providing that no claim of mistake or overcharge will be considered unless the bill for demurrage is first promptly paid, does not subject consignees to a liability to imposition in the collection of demurrage, but leaves them free to prosecute actions for damages for the collection of overcharges or for refusing to render services when no demurrage is due or payment thereof has not been unduly delayed.

Same—Assessment—Burden of Proof.

In a suit by a consignee for damages for extorting excessive demurrage charges or for withholding car service under a pretended claim for demurrage the burden is on the carrier to prove the proper assessment of unpaid demurrage, and that payment thereof had been refused or unduly delayed, within the terms of a rule requiring the prompt payment of demurrage charges.

Same—Right to Refuse to Pay Bill Made Out by Direction of Car Service Association.

The fact that a bill for demurrage charges due a railroad was made out by direction of a car service association, to which the railroad intrusted its business in the collection of demurrage, and on its letter heads, does not justify the consignee in refusing to pay such demurrage.

Appeal from Circuit Court, Warren County; Geo. Anderson, Judge.

Action by C. J. Searles against the Yazoo & Mississippi

Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Smith, Hirsch & Landau, Mayes & Longstreet, and Blewette Lee, for appellant.

McLaurin, Armistead & Brien, Green & Green, and Claud Pintard, for appellee.

TRULY, J. Stated in chronological sequence, the facts giving rise to this litigation are as follows:

On October 1, 1900, under the firm style of Searles Bros., C. J. Searles and T. M. Searles commenced business in Vicksburg, Miss. At that time, and for several years before then, the delivery of cars and the assessing of demurrage for detention thereof by consignees of freight, had been under the direction of the Louisiana Car Service Association, of which N. S. Hoskins was manager. Of this car service association both the railroads entering the city of Vicksburg were members. On December 8, 1900, C. J. Searles, the managing partner of the firm of Searles Bros., wrote to N. S. Hoskins requesting leniency on the part of the car service association in consideration of his promptness in handling the largest part of his business, and in view of the fact that he was then laboring under the disadvantage of not being able to secure an available warehouse in which to unload freight which might be consigned to his firm in car-load lots. From this date until April, 1902, the record fails to disclose any variance in regard to the question of demurrage or car service between the firm of Searles Bros. and the car service association or either of the railroads over which that firm received freight. From April until August 28, 1902, C. J. Searles, doing business as Searles Bros., and as successor to the Southern Brokerage Company, positively refused to pay any more car service or demurrage charges, and announced his deliberate determination not to recognize in any manner the authority of the car service association or its employees to assess said charges, and refused to have any conference in regard thereto with the manager or the local agent thereof. Frequent overtures were made to Searles by representatives both of the railroads and of the car service association seeking to arrive at some amicable adjustment of the pending dispute in reference to car service charges previously accrued, conditioned only that Searles would in the future recognize and comply with the rules of the car service association in reference to demurrage charges. All propositions of settlement or of arbitration were rejected by C. J. Searles, who firmly adhered to his announced decision of not recognizing the authority to any extent of the car service association. While this condition of affairs existed, on August 28, 1902, after first submitting the proposed order to the division superintendent of the Yazoo & Mississippi Valley Railroad Company, and receiving his approval

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thereof, N. S. Hoskins, manager of the Louisiana Car Service Association, directed that no cars should thereafter be switched to the warehouse where Searles Bros. and the Southern Brokerage Company transacted business or businesses. This warehouse, which Searles had secured subsequently to the writing of his letter to Hoskins hereinbefore referred to, was located on a spur belonging to the Yazoo & Mississippi Valley Railroad Company, on which were also situated the warehouses of nearly all of Searles Bros.' chief competitors in the business in which all were engaged—wholesale produce, commission, and brokerage. For many years it had been the custom of the Yazoo & Mississippi Valley Railroad Company to switch freight received in car loads to the warehouses of the consignees. After October, 1902, C. J. Searles continued business as successor of the Southern Brokerage Company, managing partner of Searles Bros., composed of himself and his brother, T. M. Searles, and as C. J. Searles & Co. composed of himself alone. All these businesses were conducted at the same warehouse, and the refusal to switch cars or freight applied to all alike. From August 28, 1902, the date of the issuance of the order declining to further switch cars, until March 9, 1903, at the Yazoo & Mississippi Valley Railroad Company, acting under said order issued by the manager of the car service association, with the approval of its superintendent, uniformly refused to place cars of freight at Searles' Warehouse, but continued as theretofore to switch all freight in car-load lots to other merchants engaged in similar business occupying warehouses similarly located. The Yazoo & Mississippi Valley Railroad did, however, furnish to Searles, upon request, empty cars for the shipment of freight from his warehouse to other points, and did, with one exception, transfer all cars received over its road to the Alabama & Vicksburg Railroad when so directed by Searles. On March 9, 1903, the chancery court granted to Searles a mandatory injunction commanding the Yazoo & Mississippi Valley Railroad Company to switch and place at Searles' warehouse freight received in car-load lots in the same manner that it did freight received for his competitors in business also occupying warehouses. Pending this suit, and prior to final hearing, an agreement was entered into, by which Searles and the railroad company each agreed to pay any demurrage which might fall due thereafter under the rules governing that matter; such payment to be without prejudice to the rights of either party in the pending litigation. Thereupon C. J. Searles, in the name of C. J. Searles & Co., filed his declaration in the circuit court against the Yazoo & Mississippi Valley Railroad Company, claiming that between the date of August 28, 1902, when first refusal to place cars was made, up to the date of the filing of the suit, the Yazoo & Mississippi Valley Railroad had received over its own line,

and refused to switch and place at his warehouse, or had refused to receive from the Alabama & Vicksburg Railroad and switch and place at his warehouse, 135 cars of freight in car-load lots, by reason of which action he had been compelled to receive his freight on the wagon and delivery tracks of the Yazoo & Mississippi Valley Railroad, all some distance from his warehouse, entailing on him an additional expense for labor, draying, and extra clerk hire of \$1,905.05; and he also claimed in his declaration a statutory penalty of \$500 for each car load of freight which the railroad had refused to switch and place at his warehouse, averring that the railroad and the car service association had discriminated against him; that the car service association was a "trust" or "combine" within the meaning of the Mississippi statute in that regard, whereby he was entitled, as the injured party, to receive the penalty allowed under the statute. The case was tried before the circuit judge, a jury being waived. In addition to the foregoing facts, it developed upon the hearing that Searles alone of all merchants in Vicksburg engaged in similar business refused to recognize the authority of the car service association; that, while disputes over bills had from time to time arisen between other merchants and the railroads in reference to the correctness of several assessments of demurrage charges, such disputes had been adjusted or were in process of adjustment, and that no order had been issued refusing to switch cars for any other merchant, though such order had been threatened in several instances when the settlements had been unduly delayed. It is undisputed in the record that cars would have been switched for Searles had he agreed to pay demurrage charges when the same might rightfully accrue under the rules of the car service association. It was further in evidence that the Louisiana Car Service Association operated solely in regard to the assessment of demurrage under rules in reference thereto adopted and promulgated by the Mississippi Railroad Commission, and that car service charges were not claimed except under the circumstances authorizing under said rules the collection thereof; that the order refusing to have cars switched and placed for Searles was issued not by order of the executive board of the car service association, or with its knowledge, but by its manager, after the same had been submitted to and approved by the division superintendent of the Yazoo & Mississippi Valley Railroad, and was issued solely for the purpose of enforcing compliance on the part of Searles to the rules of the Mississippi Railroad Commission authorizing the collection of demurrage under certain stated circumstances. The circuit judge held that the car service association was a trust and combine within the meaning of chapter 88, p. 125, of the Acts of 1900, and awarded Searles damages for \$60,861.30, being the statutory penalty for each car of freight which the railroad had refused to place at his

warehouse, and, in addition thereto, the amount paid out for the drayage and handling of the freight contained therein. From this judgment the Yazoo & Mississippi Valley Railroad Company appeals.

The first question presented for consideration in arriving at a decision in this case is, what is a "trust" or "combine" within the meaning and condemnation of the statute cited? A determination of this question necessitates a brief examination, at least, of the history of anti-trust legislation in our state.

Section 198, Const. 1890, commands the Legislature to "enact laws to prevent all trusts, combinations, contracts, and agreements inimical to the public welfare." It must be observed at the outset that not all trusts, combinations, contracts, and agreements were to be prohibited, because the great lawmakers who framed the fundamental law of this commonwealth as the same is embodied in our present Constitution well knew that such legislation would be palpably trenching upon, if not absolutely violative of, the inherent rights of the citizen, and would be restricted to an unwarranted degree of the privilege of contract which every man is entitled to enjoy under our form of government. Tiedeman, *Lim. Police Powers*, 244. No such legislation was authorized because no such legislation was demanded. Only such trusts, combinations, contracts, and agreements were to be prevented as would be "inimical to the public welfare." Acting under this authority, section 4437, Code 1892, was adopted, providing that a trust or combine is a combination, contract, understanding, or agreement, expressed or implied, between two or more persons, corporations, or firms and association of persons, or between one or more of either with one or more of the others, to do certain things therein enumerated; amongst others "(g) to place the control to any extent, of business or of the products or earnings thereof, in the power of trustees, by whatever name called; (h) by which any other person than themselves, their proper officers, agents, and employees shall, or shall have the power to, dictate or control the management of business." And having enumerated the various kinds of contracts which were denominated trusts and combines, the section proceeds to declare them to be "inimical to the public welfare, unlawful, and a criminal conspiracy." An analytical study of this section demonstrates that it was the legislative design to prohibit and provide punishment for the formation of any criminal conspiracy by which the interest of the public might be in any manner injured or jeopardized; whether such combination was intended to be in restraint of trade, to limit, reduce, or increase the price or the production of any commodity, or to hinder competition in the importation, manufacture, transportation, sale or purchase of any commodity, or to do certain other enumerated acts, which

would, in the judgment of the Legislature, prove prejudicial to the interest of the public or any part thereof, or of any individual; the reason for this legislation being—as is so aptly phrased by Whitfield, J., *Insurance Company v. State*, 75 Miss. 24, 22 South. 99—that: “Conspiracies of this class are raised to the grade of felony, and pronounced obnoxious to the public policy of this state, and inimical to the public welfare by reason of the great mischief they are known, of all men, to accomplish, as manifested by the course of legislation and decision the country over. Such trusts constitute one of the greatest menaces to public welfare known to modern times, and the Legislature has wisely made them felonies, and denounced this severe penalty against them.” The design of the Legislature was to protect the public, not to unlawfully restrict the transacting of business by either corporations or individuals. The various kinds of legitimate business rendered necessary by the multiform demands of public convenience, the manifold callings which are an incident of this progressive age, all demand that the individual right of contract shall be given full sway, conditioned only that the rights of the public and the welfare of the people and the public policy of the state shall be held sacred. Says Terral, J., *Houck v. Wright*, 77 Miss. 483, 27 South. 617: “The Legislature, by the chapter on trusts and combines, did not intend to debar a person from conducting his own private business according to his own judgment.” In this connection Whitfield, J., in *Insurance Company v. State*, supra, says: “It [the Legislature] therefore prohibited any trust whose object was to place the control of any business in the power of trustees, where the effect of such trust should be to injure the public or any particular person or corporation in this state. Such legislation has become very general in the United States, owing to the pernicious results of such trusts.” It appears, therefore, from these previously announced, well-considered, and strikingly accurate statements of the scope and purpose of the law by this court, that one of two things must exist in order to render a contract or agreement between two or more persons or corporations subject to the condemnation of paragraphs “g” and “h” of the act now under consideration: First, it must place the control to some extent of the business or of the products or earnings thereof, or it must give the power to conduct or control the management of such business to trustees or persons other than the proper officers, agents, or employees of the contracting persons or corporations; or, second, it must have the effect of injuring the public or some particular person or corporation in this state.

The correctness of the definition which recognizes that a “combine,” to fall within the purview of the legislative design, must have as a constituent element either a violation of public policy in that it tends to create a monopoly or is

in restraint of trade, or that it involves a delegation and abandonment of corporate powers and is inimical to the public welfare, is emphasized and made more manifest, by reference to legislation dealing with this subject enacted subsequent to the adoption of Code 1892, § 4437, herein before cited. The purpose of the Legislature of this state, the object it had in view, the evil it sought to prevent, appear in the title, given in conformity to the constitutional requirements as setting forth the subject-matter dealt with, to chapter 88, p. 125, Acts 1900, which is the latest expression of legislative will. That act is entitled "An act to define trusts and combines, to provide for the suppression thereof, and to preserve to the people of this state the benefits arising from competition in business." And the same intention is again declared in section 11 of the act, which directs that it shall be liberally construed to the end that trusts and combines may be suppressed, and the benefits arising from competition in business preserved to the people of this state. The benefits which the Legislature sought to secure to the people of the state were those which naturally flow from competition in business. In order to insure these benefits, it was provided that any contract entered into between two or more persons or corporations should be unlawful if it in any wise restrained or decreased the advantages known to arise from competition in business, whether such contract was expressly and openly in restraint of trade, or whether, by its effect, it was indirectly liable to reduce or increase prices, to increase or reduce production, to engross or forestall or to hinder competition in production, manufacture, transportation, sale, or purchase of any commodity. All contracts, whether expressed or implied, which would necessarily or probably have any of the effects therein forbidden were declared to be violative of the announced public policy of the state in that they inevitably tended to reduce the benefits sought to be insured by the act. It was also forbidden for any two or more persons or corporations to issue, own, or hold the certificates of stock of any trust or combine. This provision was clearly aimed at the well-known plan by which the stock of various corporations, surrendering their own corporate entity, engaged in a partnership of their own; such arrangements being palpably in restraint of trade, and tending inevitable to the creation of a monopoly. It was further provided by paragraphs "g" and "h" that it should be unlawful for two or more persons, firms, or corporations, or one or more of either with one or more of the other, to form any contract or combination by which the power to dictate or control the management of the business, or by which the control of the business or of the products and earnings thereof, was placed in the power of any other person than their own proper officers, agents, and employees. These paragraphs are a rescript of the provisions originally contained in

section 4437, *supra*. It should be observed that these paragraphs, and in fact the whole chapter, deal with both corporations and individuals alike. And in construing such statutes the general rule is that the nature of the business contemplated by the contract or arrangement and the tendency of the contract as affecting the public, rather than whether the parties to the contract are corporations or individuals, are to be considered in determining whether it violates public policy. *Hirschl. Combination, Consolidation and Succession of Corporations*, p. 2.

This consideration eliminates from this discussion the question of to what extent limitations upon the power to contract may be placed by the state upon corporations solely and only in a proper exercise of its reserved police power. When analyzed, the propositions contained in the paragraphs cited are not novel. They are, in truth, but mere announcements of familiar principles contained in varying form in many statutes germane to this subject. They and all the provisions of the act are but means to an end, details of the legislative plan. The result desired—the purpose of the entire legislation—was to suppress trusts, secure the benefits arising from competition in trade, prevent monopolies, and protect the people from the possible tyranny and oppression of combined wealth. In fact, a brief investigation will show that all modern anti-trust legislation is based upon the same fundamental principle. All combinations are forbidden the necessary, natural, or probable consequence of which will be to increase or decrease the price of production of any commodity, or which restrict facilities in the handling or transportation of the same. Contracts or agreements, of whatever character, by which the autonomy of corporations is surrendered and the exercise of their charter powers delegated to others, are denounced as violative of public policy. Corporations which enjoy no powers except those of which they are recipients by charter grant, are without power to absolve themselves from the performance of their duties to the public, and contracts abnegating such performance and alienating the powers granted them by the state are void. *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *Ray Contractual Limitations*, p. 240. Arrangements, under whatever guise, by which the stock of several distinct corporations is placed in the hands of certain trustees, who are vested with power of voting it, are condemned as tending inevitably to the creation of monopolies, and the absolute destroying of competition in the production or transportation of many commodities, and, as a direful result, a few individuals would be able to fix the price of the very necessities of life, with power to increase or decrease without regard to supply or demand, but solely as their agreed and rapacity might dictate. The wisdom of such legislation

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and the imperative necessity of its strict enforcement is evidenced by the fact that the aggression of mighty aggregations of corporate wealth so formed now constitute one of the gravest problems with which the nation has to deal. *Northern Securities Co. v. U. S.*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 698; *Pearsall v. Great Northern R. R. Co.*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838. In short, without unduly extending these observations, the formation of all contracts and combinations is condemned by which corporations or individuals are banded together for any illegal purpose, or, if such association be already in existence, the parties will be inhibited from continuing operations thereunder.

But at last the test, and only test, is, not what the intent of the parties may be, not what form the combination has taken, but what will its probable effect be? If unlawful or oppressive, if obnoxious to public policy, if inimical to public welfare, they will be denounced, and punishment meted out to every participant; otherwise courts will not limit or restrict the inalienable right of contract, and will not interfere unless the violation of law be apparent, or the apprehended evil effect assume some tangible form. *Noyes, Intercorporate Relations*, §§ 392, 401, 405. We uphold and maintain in its full integrity the doctrine which recognizes the right of the state, in the exercise of its reserved police power, to restrict the power of corporations to contract within certain prescribed limits, and which forbids that such power should ever be so abridged or so construed as to permit corporations to conduct their business in such manner as to infringe upon the rights of individuals or the general well-being of the state. That power inheres in the sovereign, and the protection from the encroachments of corporations is assured by the guaranty of section 190, Const. 1890. But that doctrine is not assailed here. This is a case involving not legislative power, but legislative will. In this direct connection it must again be observed that by the act now under review what is forbidden to corporations is likewise forbidden to individuals. The contracts and agreements which are by paragraphs "g" and "h" condemned fall under the ban of the law whether entered into by corporations solely among themselves, or jointly with individuals, or by several individuals alone.

It is contended that all combinations or contracts, without regard to purpose, intent, or defect, by which the control to any extent of business or of the products and earnings thereof is placed within the power of trustees, or by which other persons than the contracting parties or their proper officers, agents, or employees are given the power to dictate or control the management of business, are prohibited by the terms of the act. If this narrow construction is in fact the legislative intent, the entire law would be open to the just criti-

cism of being a wholly unnecessary, if not an unwarranted, invasion of the inherent right of the citizen to deal with his own as he pleases, if without injury to others. *Gage v. State*, 24 Ohio Cir. Ct. R. 724. Carried to its logical conclusion, this argument would prevent any two or more individuals engaged in business from employing the same agents or representatives, or from placing in the hands of the same individual the right to control their separate businesses. So two planters, owning adjoining plantations, by employing the same manager to control both places, with power to manage the business, dictate to the laborers, and dispose of the products, would be guilty of a criminal conspiracy. Two jobbers, who employ the same traveling salesman, with power to accept or reject orders to be transmitted to one or the other of the stores, or two merchants who employ the same drayman to haul and deliver their freight; or two express companies which employ the same messenger and deliveryman; or two railroad companies which employ the same ticket or freight agent at union depots; or two insurance companies which employ the same adjuster, with power to settle losses; or two lumber companies which employ the same attorney with power to adjust disputed claims or impending litigation; and many other cases of every day occurrence—would each be violative of the law now under consideration, and every participant therein would be subject to the severe penalties therein prescribed. We cannot adopt or sanction this restricted view. The true interpretation, in our judgment, is that only such contracts and agreements (within the purview of the paragraphs now under review) are forbidden which, on account of their natural result, are obnoxious to public policy, or which, in themselves, are by necessary effect inimical to the public welfare. Practically the same construction has been placed upon the anti-trust laws of other states, which, though clothed in different verbiage, contain substantially the same ideas, and are designed to attain the same end. Thus the Supreme Court of Montana in a very recent case, in discussing the constitutional and statutory provisions of that state relating to this matter, says: The Constitution "deals generally with the rights and powers of corporations and associations of persons exercising any of the powers and privileges not possessed by individuals or partnerships and their duties and purposes. It is prohibitory and restrictive in its general scope and purpose, the design of the convention in adopting its provisions being to prevent combinations to restrict or repress competition in all industrial pursuits, and to protect the people in general and the employees of a certain class against both the Legislature and combinations of capital from unjust impositions." And after showing that certain consolidations, such as that of competing railroads, telegraph and telephone companies, and the like, are absolutely prohib-

ited, "as having a necessary tendency to restrict competition," the court proceeds to a discussion of the anti-trust statute: "Apart from these wholesome restrictions and prohibitions, the right of the people to accumulate property and to hold and enjoy it, either by individual effort or by means of associations of natural or artificial persons, is not restricted. Section 20 prohibits any combination or contract which has a particular purpose, to wit, 'fixing the price or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people.' The terms 'combine' and 'form a trust' were evidently intended to be read in connection with the expression 'for the purpose,' etc.; clearly implying that, in order to subject offenders to the severe penalties which the Legislature might impose, there must be shown a specific intent to do the prohibited act, or that the association or combination necessarily tends to accomplish the same result. That this is the meaning is clear from the enumeration of persons who may not do the prohibited acts. Corporations, stock companies, natural persons or partnerships, are all included. If the criminal intent is not a necessary ingredient of the evil denounced, then all sorts of combinations are to be deemed prohibited, even ordinary copartnerships, as coming within the letter of the prohibition; for the terms 'combine' and 'form a trust' are of equal dignity. If the former is to be regarded as modified and explained by the clause 'for the purpose,' etc., by the same rule must the latter also. The term 'trust' is assigned the meaning given to it by the text-writers (Cook on Corporations, § 503a; Spelling on Trusts, § 121), and includes any form of combination between corporations or corporations and natural persons for the purpose of regulating production and repressing competition by means of the power thus centralized." And after showing that the term was first used in a narrower sense, and applied only to transfer of stock by several corporations to trustees, with power to vote, the court continues: "If it be construed as equivalent to the term 'combination' or 'consolidation,' the meaning of the section is perfectly clear. If used in the sense of the definition given it by the text-writers, it is none the less clear, though it involves a repetition of the same idea; since the definition includes the idea of criminal purpose, and makes it a necessary ingredient of the offense denounced. The section of the statute quoted involves the same idea and demands the same construction, though it is more specific in its provisions, and extends to and includes combinations in restraint of competition in transportation. It denounces every form of combination or contract which has for its purpose, directly or indirectly, the restraint of production or trade in any way or manner, or the control of the price of any article of consumption by the people. It was not the purpose of the convention or the Legislature to limit either the

term used in the Constitution or in the statute by any narrow definition, but to leave it to the courts to look beneath the surface, and, from the methods employed in the conduct of the business, to determine whether the association or combination in question, no matter what its particular form should chance to be, or what might be its constituent elements, is taking advantage of the public in an unlawful way. *Harding v. Am. Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189. In each case, therefore, under these provisions, the nature of the arrangement or combination is a question of fact to be determined by the court from the evidence before it, or from the vice which inheres in the contract itself." *McGinnis v. Boston & M. Consol. Copper & Silver Min. Co. (Mont.)* 75 Pac. 94; *Ceballos v. Munson S. S. Line*, 93 App. Div. 595, 87 N. Y. Sup. 811, and cases cited.

Nor is the rule of construction different when applied to the federal anti-trust statute. "It is now settled," says the Circuit Court of Appeals, "by repeated decisions of the Supreme Court, that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade or enhance the business of those who make it, it does not constitute a restraint on interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success to their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states." *Phillips v. Iola Portland Cement Co.*, 125 Fed. 594, 61 C. C. A. 19. And for an exhaustive and very lucid discussion of the same subject, in which the same result is reached, see the elaborate opinion in *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689, supported by numerous extracts from opinions of the United States Supreme Court.

As the latest authoritative utterance upon this subject we quote from the opinion of the Supreme Court of the United States in *Northern Securities Company v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 698, where, among other propositions, which it is announced are plainly deducible from previous decisions of that court, which are reviewed,

are the following, which embrace the case at bar: "That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains, instead of promoting, trade and commerce. That, to vitiate a combination such as the act of Congress condemns, it need not be shown that the combination in fact results or will result in a total suppression of trade, or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition." Justice Brewer, in his concurring opinion in that case, also speaking of the federal anti-trust statute, says: "That act, as appears from its title, was leveled at only 'unlawful restraints and monopolies.' Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable, and against public policy. Whenever a departure from common-law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear, and such a departure was not intended. Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen."

By parity of reasoning we think these observations strikingly applicable to our own statute. The object of the federal anti-trust statute is to preserve to the people of the entire nation the benefits arising from competition in business by preventing monopolies and contracts in restraint of trade in regard to commerce among the states. The object of the state legislation is to preserve to the people of the state the identical benefits by preventing monopolies and contracts in restraint of trade in regard to domestic commerce. To vitiate a combination such as the statute condemns, it is essential to show that by its necessary operation it tends to restrain trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition; the trade or commerce so affected being domestic or interstate or foreign, according to whether the state or federal statute is invoked. But to vitiate the combination the effect must be detrimental to the interests of the public under either statute. An approved statement of the rule is this: "Combination for business purposes is legal. Combinations are beneficial as well as injurious, according to the motives or

Nor is the force of the inference logically drawn from this action of the Railroad Commission weakened by the suggestion that the commission has never undertaken to supervise car service associations, but has studiously refrained from assuming the authority vested in it by the Legislature, and has restricted the operation of its rules in reference to demurrage and car service charges to the railroads solely. This contention will not bear the test of investigation. That the Railroad Commission has assumed and is now exercising supervision of car service associations is made evident by an inspection of the rules adopted and formally announced by the commission and accepted and established by the Louisiana Car Service Association for its guidance in the transacting of its operation. It is true that these rules require the railroad company handling the freight to give notice of the arrival of the car; but this is a mere announcement by the law as it exists, irrespective of the rule. This is a duty imposed upon the carrier by the law, and its prompt performance is, by the rule, made a condition precedent to the collection of any demurrage charges. Car service associations have nothing to do with the handling of freight or the notifying of consignees of its arrival. Their services are only called in to requisition after "legal notice," as defined by the rules, has been duly given the consignee. It is also true that the rules speak of the demurrage charges being collected by the railroads, but this is again in accordance with the established usage of such associations. Car service associations are simply agencies employed by railroad companies to insure prompt, accurate, and impartial assessing of demurrage; but in each instance it is assessed in favor of the railroad entitled to it, and it is collected by that railroad, sometimes by the Car Service Association of which it is a member, sometimes by some other of its various employees, according to the custom of the railroad in reference to its collections. But by rule 11 the Railroad Commission prohibits any charges for demurrage or storage being made except as permitted by its said rules. Rule 12 limits the operations of the rule permitting demurrage charges to "places where car service rules are in operation," thus tacitly acquiescing in and indorsing the enforcement of car service rules; while rule 13 in express terms recognizes the existence of car service associations by providing that demurrage shall be collected for the detention of "private cars" when the same are detained, presumably, even by the owners of the cars, on the tracks belonging to or operated "by members of this association." It is a fact fraught with significance that these rules were not adopted by the Railroad Commission until by legislative enactment power to supervise car service associations had been vested in it. Finally, a reference to the records of the commission definitely settles its intent beyond the peradventure of a doubt, for the resolution adopting the very rules

now under consideration in express terms declares that the rules are "adopted for the car service associations doing business in this state." And by resolution subsequently adopted car service associations were warned that "under authority conferred upon the Railroad Commission by chapter 82, Laws 1898," they were expected to make reports as the commission might direct. Record Book 3, pp. 149-164. It is manifest, therefore, that not only did the Legislature intend to place car service associations under the supervision of the Railroad Commission, but that control was in fact assumed and exercised by the commission. We are forced, by these considerations, to the conclusion that this position of appellee is untenable.

The argument is strongly pressed that the Louisiana Car Service Association, by the manner in which it enforced its rules and regulations in the instant case, acted in such an unlawful or oppressive way as to put itself beyond the pale of the law, and deprived it of the rights and privileges granted by the rules and regulation of the Mississippi Railroad Commission. In addition to the rules regulating the collection of demurrage charges and stating the amount and circumstances under which the same might be collected, the Railroad Commission further provided: "Rule 9. No discrimination in charges allowed between persons or places. Railroads shall not discriminate between persons or places in storage or demurrage charges. If a railroad company collects storage or demurrage of one person, under the demurrage rules, it must collect of all who are liable. No rebate, drawback or other similar devise will be allowed. If demurrage is collected by the railroad company at one point on its line, it must collect at all places on its line of those liable under the rules of this commission. Provided, that the commission shall hear and grant applications to suspend the operation of this rule whenever justice shall demand this course." Without disobeying the express mandate of this rule, and thereby subjecting itself to the penalties prescribed by chapter 82, p. 97, Acts 1898, the Louisiana Car Service Association was without authority to refuse or neglect to collect demurrage from one merchant, when, under similar circumstances and conditions, it demanded and received such charges from other merchants. This is forbidden, and most rightfully so, by the mandate of the Railroad Commission which gives to the operations of the car service association the sanction of its approval. Such favoritism would work discrimination of the grossest kind, by giving to one merchant an unconscionable advantage over all competitors engaged in the same business. If a railroad or a car service association had the authority at its mere whim and pleasure to permit one merchant owning a warehouse on a side track to receive freight and keep it stored in its cars without demanding demurrage for their detention, while at the same time the collection of such charges

was demanded and enforced of another merchant in the same line of business, and owning a warehouse similarly located, it would place it in the power of the carrier by such arbitrary action to build up the one business and place a heavy burden upon the other. This rule was devised to prevent the possibility of such combination between carrier and merchant; an arrangement which would in truth be a "combine" with the inevitable and pernicious effect of decreasing the benefits arising from competition in business, because by building up one business and breaking down competition it would tend to create a monopoly for the benefit of the unjustly favored few. *American Warehousemen's Ass'n v. Railroad*, 7 Interest. Com. R. 556. An inspection of the rules of the Railroad Commission shows that the right at any time to suspend the operation of this rule whenever justice shall demand this course is expressly reserved; the object of this wise and thoughtful provision being, of course, that whenever, by reason of untoward or unforeseen circumstances, the imposition of demurrage charges would work a hardship or injury to any particular place or community, the rule could be suspended, so that what was designed as a benefit to the public cannot be converted into a weapon of oppression. In the instant case we find that during the entire period covered by this controversy demurrage was demanded and collected of every other merchant doing business in the city of Vicksburg by whom it was rightfully due. We find further that Searles alone of all men engaged in similar business, and, so far as the record discloses, of all merchants in the city of Vicksburg, denied the power and authority of the car service association to impose and collect demurrage. Under such circumstances it was not only the right, but it was the duty, of the car service association, representing in this instance the Yazoo & Mississippi Valley Railroad Company, to accord to Searles the same treatment which his competitors received. If on account of any special circumstances—of which, however, the record gives no hint—the imposition of demurrage charges in the city of Vicksburg worked a special hardship, the parties aggrieved had an adequate remedy by applying to the Railroad Commission to temporarily suspend the operation of the rule. This appellee did not do, contenting himself by refusing to pay demurrage, and hauling his freight from the public delivery track by drays. The fair and impartial collection of demurrage is expressly enjoined upon car service associations, and they are forbidden to administer and enforce their rules "with an evil eye and an unequal hand," so as to make the unjust discrimination between persons or places in similar circumstances.

In the extremely elaborate opinion of the trial judge it is said: "If, therefore, the question was, do the published rules of the Railroad Commission, adopted by the car service

association, and being, as Mr. Hoskins, the manager, says, the only rules they have, constitute them a trust and combine under our statutes? probably plaintiff would have no standing in court. But it appears from the conduct of the parties composing this association and the testimony of their manager, Mr. Hoskins, that they operate under two sets of rules—one the exoteric or published rules in evidence, known to and for the benefit of the outside public, including the courts; and the other the exoteric or the arbitrary and discretionary powers of the manager himself, known only to and for the benefit of those living within the inner circle, the members of the association and its agents. It is the acts of the association under the latter rules that furnish the basis of this controversy, and which we are called upon to consider." And after an extended discussion the judge arrives at the conclusion that the Louisiana Car Service Association, by reason of its operation under certain unpublished rules, so called, has brought itself within the scope of our anti-trust statute. Applying settled principles of law to established facts, will this conclusion, in the light of this record, bear scrutiny? It is, of course, true that courts will look through the form to ascertain the character of any association, and will judge of its nature not merely by its promulgated rules, but by its actual operation as well, and will decide the question of its legality or illegality according to the true nature and probable effect of the arrangement, without special regard to the form which has been assumed in each particular instance. If an apparently innocent form is in truth but a disguise assumed to mask a sinister design, the court, disregarding the outward shape, will condemn the arrangement. This rule has the indorsement of the highest judicial authority. But it is equally as true that, if the form of the arrangement be legal, and its aim and purpose such as the law will uphold, it will not be denounced from the fact alone that the objects for which the agreement was entered into are occasionally effectuated by rules which are only invoked as it becomes necessary to cope with unforeseen contingencies as they arise. If the contract, understanding, or agreement be not of itself inimical to the public welfare, nor in contravention of express statute, it will be upheld, unless it be so operated as to become oppressive by infringing upon the rights of private individuals, or unless it works to the detriment of the general public.

Making an application of these general principles to the concrete case here presented, we find that the Louisiana Car Service Association is one of a class of combinations the existence of which, in this state, is recognized by an act of the Legislature; that the prime aim and purpose of similar associations has been, by repeated adjudications of courts of last resort, upheld, and pronounced beneficial to public and carrier alike; that the rules for its

government and for the transaction of its general, ordinary, and routine business are framed by the Railroad Commission, the tribunal invested by law with absolute power of supervision; that, if unexpected cases arise, not covered by the general rules, the manager of the association copes with such difficulties in his discretion, until his action in the premises can be reviewed by the officials composing the executive board of the association. The legality and validity of the general rules of the association being vouched for by the action of the Railroad Commission, the question next presented is: Was the special order of August 28, 1902, refusing to switch cars for appellee, so unreasonable in its terms and such an oppressive act as to make the association a combination inimical to the public welfare, or was it the exercise of such power as showed that the Yazoo & Mississippi Valley Railroad Company had surrendered the control "to any extent" of its business so that persons other than its proper officers, agents, or employees had the power to dictate or manage the same? This is the pivotal question upon this branch of the case. After the most careful and protracted consideration, we have reached the conclusion that the special order referred to was not, under the circumstances of this case, discriminative or oppressive. It was in fact but the re-enactment and putting in force of a rule of similar import which was in force with the Louisiana Car Service Association prior to the promulgation of the present rules by the Mississippi Railroad Commission and their adoption by the association. The enforcement of this special order was nothing more nor less than an effort to carry into effect that rule of the Railroad Commission which requires the collection of demurrage from all alike who are subject thereto. The condition of affairs as it existed at that date amply justified the Louisiana Car Service Association in invoking the aid of the rule in question. That rule is as follows: "Rule 10, § 2. On deliveries to private sidings, in cases where consignees or consignor refuse to pay, or unnecessarily defer settlement of bills for car service charges, the agent will decline to switch cars to the private sidings of such parties, notifying them that deliveries will only be made on public delivery tracks of company, and will promptly notify the manager of the action taken." In almost identical terms this rule was before this court for consideration in a case involving the right to collect demurrage, the reasonableness of the rules, and the power to detain freight to enforce payment of demurrage and car service charges. At that time, after thorough investigation, upon full presentation of the question, this court announced as its conclusion that car service associations were legal, their charges just and enforceable, their rules valid and reasonable. *Railroad Company v. George*, 82 Miss. 710, 35 South. 193, and see rule 3. We see no reason

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to withdraw from the position assumed in that case, which has been strengthened and fortified by several strong and well-reasoned decisions in other jurisdictions. *Railway Co. v. Dorsey Fuel Co.*, 112 Ill. App. 382; *Railroad Company v. Midvale Steel Company*, 201 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836; *Schumacher v. Railroad Co.*, 207 Ill. 199, 69 N. E. 825; *Pennsylvania Millers' State Ass'n v. P. & R. Ry. Co.*, 8 Interst. Com. R. 531.

Did appellee, by his conduct, bring himself within the operation of this rule? For reasons which are apparent, and the justice of which is readily demonstrable, the rule under consideration says to the favored consignee having a warehouse on a private siding: "If you will pay demurrage and car service, you can enjoy the advantage of having your carload freight delivered at your warehouse; but if you refuse to pay or unnecessarily defer paying for such service, you must get your freight at the public delivery track, as do less favored consignees." Appellee refused to recognize the car service association, refused to comply with its rules, refused to pay demurrage charges without knowledge and without inquiry as to their justness or correctness, and without reference to what representative of the appellant sought to collect them; planting himself squarely on the ground that he would not allow the car service association to in any manner concern itself with the handling of his freight. It is suggested in argument that the reason of these repeated refusals was because appellee had an unadjusted claim for damages to a car of corn, but the record shows that the dispute about the corn arose long subsequent to the issuance of the order refusing to switch cars for appellee. But, even if true, this would be no valid excuse justifying appellee in refusing to pay demurrage when the same was justly due. Demurrage is secured by a lien on the freight in the specific car for the detention of which the charge has been incurred, and this lien must be discharged before the consignee has any right to demand the possession of the freight. It is manifest, and practically undenied in the record, that appellee denied the legality of demurrage charges as assessed by the car service association, and announced his intention of ignoring its action. In the face of this expressed determination by appellee, the Louisiana Car Service Association and the Yazoo & Mississippi Valley Railroad Company were forced to choose one of two courses: either continue to switch and place cars for appellee without collecting demurrage, and thus allow him an unconscionable advantage over his competitors, and also subject themselves to the penalties provided for disobedience to the mandates of the Railroad Commission, or invoke the rule which permitted them to refuse to further switch cars for an uncompromising recalcitrant consignee. Confronted by this condition, brought about by the persistent refusal of appellee, appellant and the car serv-

ice association chose the latter horn of the dilemma, and in so doing, in our opinion, they were clearly in the right. The facts do not bear out the suggestion that this order was simply a retaliatory measure on the part of the appellant to punish appellee for his contumacy. Before the order was issued repeated overtures were made to appellee looking to a settlement of the pending differences, propositions of arbitration and an offer of submission to the sole decision of a gentleman of highest probity, pre-eminent ability, a profound jurist, and closely allied to the appellee, were all rejected. From start to finish of this controversy the issue was forced by appellee. The further switching and placing of cars at appellee's warehouse would have been a delivery of each particular car, and to have thus continued to deliver car loads of freight to a consignee who declared his intention of persisting in his refusal to recognize the validity of demurrage charges would have entailed upon the appellant endless litigation, inasmuch as suit must have necessarily been brought for the demurrage accruing on each shipment, thus breeding a multiplicity of suits and conserving no good end. A just observance of the rights of the shipper and of the consignee is mandatory on every common carrier. They are responsible for actual damages caused by unwarranted and avoidable delay in the transportation of freight, and are accountable for every dereliction of duty. The rights of the shipper and consignee being amply protected, the carrier is entitled to equal fair dealing at the hands of the consignee. If the placing of cars after arrival at destination is unduly delayed, without lawful excuse, the consignee who may be entitled to have his cars switched and placed can recover not only demurrage, but such actual damages as may be caused by the negligent delay of the carrier. With equal justice the carrier has the right to demand and collect of the consignee demurrage for his unreasonable dilatoriness in unloading the cars after they have been so placed. There is a reciprocity of indemnity under the rules governing demurrage promulgated by the Mississippi Railroad Commission. We have narrated somewhat at length the facts and circumstances attendant upon the issuance of the order of August 28th, so that the relative attitudes upon the parties might be apparent, for the reason that this will become of vital importance when we come to the consideration of another branch of the case.

The reasonableness of the order, so far as its general tenor and effect are concerned, being established, the question whether it was rightfully invoked in the instant case does not affect the question of whether a car service association is or is not a trust or combine. So far as that question is concerned, it may be conceded that the enforcement of the order against appellee was unwarranted; but this, while rendering appellant liable to damages, would not alter the character of the association, or in any manner assist us in determining its

real nature. That every railroad company is entitled to charge and receive extra compensation for extra services rendered after the arrival of freight at its destination, such as reconsignment charges, car service or switching charges, demurrage, and the like, and that, acting alone, each railroad would have the right to collect such charges for itself in every proper case, is now finally settled beyond dispute. *State ex rel. v. Atchison, etc., Ry. Co.*, 176 Mo. 687, 75 S. W. 776, 63 L. R. A. 761; *Baldwin, American Railway Law*, p. 357; *Elliott on Railroads*, § 1567; *Schumacher v. Railroad*, supra. It could therefore only be for exceptional cause of oppression or wrongdoing that an agreement among several railroads, each of which is entitled to enforce such charges, by which a plan is devised for the accurate assessing and convenient and inexpensive collection of such charges for each of the contracting companies, should be pronounced unlawful by the courts. An agreement lawful in its character and lawful in its purpose is not rendered unlawful even if some of its members should attempt to put it to an unlawful use. *Eddy on Combinations*, 369; *Commonwealth v. Brown*, 23 Pa. Super. Ct. 470. In *Commonwealth v. Carlisle*, Brightly, N. P. 36, the rule is thus stated: "When the act is lawful for the individual, it can be the subject of a conspiracy, when done in concert, only when there is a direct intention that injury shall result from it, or when the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence." In our judgment the trial judge erred in holding that the order of August 28th, issued under the circumstances set forth in this record, and not of itself unreasonable in its express terms, being simply the exercise of a power previously sanctioned by this court, was an "esoteric rule" of such baneful nature that it transformed an association lawful in its purpose and beneficial in its results to a criminal conspiracy "inimical to the public welfare." We have found no authority sustaining such a proposition. *Eddy on Combinations*, p. 1328.

We are next urged to declare the Louisiana Car Service Association a trust and combine, because, it is contended, the testimony in this case shows that its formation involved the delegation by the corporations constituting its membership of the management and control of their business to the persons managing and operating the association; that, these persons not being the "proper officers, agents, or employees" of the railroad companies, therefore the arrangement falls beneath the ban of condemnation pronounced by the law which forbids any person other than the proper officers, agents, or employees of a corporation to "control the management of its business to any extent." And in support of this position it is said: Concede that car service associations, as institutions, are legal in their nature; that, as a general rule, they

violate no provision of law, and as operated they are not to the detriment of the public interest; and that they are entitled to be upheld so long as they govern themselves solely by the rules formulated for their government by the Railroad Commission—still it is contended the testimony shows that this particular car service association to which appellant belongs is a combination in violation of law, because it is not, nor are its operatives, the proper officers, agents, or employees of appellant, and yet the association is vested with power to control the management of the business of its members to some extent. And the special order of August 28th is referred to in support of this argument. But the premises in no wise warrant the conclusion. The argument assumes that the Louisiana Car Service Association and its operatives are not the agents of the appellant, and then assumes that the order referred to was issued in the exercise of an arbitrary discretion on the part of the manager of the association, and, having thus assumed as true all that it was necessary to prove, proceeds to draw the conclusion indicated. This is "vaulting the chasm," both in logic and in law. Let us see if the proof warrants either assumption. In another connection we have already referred to chapter 82, Acts 1898, whereby the Legislature made all car service associations doing business in this state subject to the control and supervision of the Railroad Commission. In view of this action on the part of the lawmaking power of the state, having authority to authorize or forbid the operation of such associations, the contention that a car service association is of itself a "combine" forbidden by the law is untenable. It is not conceivable that the Legislature would thus recognize and give at least an implied approval to the existence of an association, if the same at that very time stood condemned by the law. It cannot seriously be contended that the Legislature acted in ignorance of the end which was sought to be furthered by the formation of such associations, or the functions which were exercised by them, for the act itself states that they are "associations governing or controlling cars or rolling stock of railroads." Yet it would be necessary for us to impute this inexcusable ignorance to the Legislature if we were to accept as sound the contention that it was thus dealing with an association which was under section 4437, Code 1892, at that very moment operating in open and palpable violation of law. It cannot be conceived that the Legislature would solemnly submit to the supervision and control of the Railroad Commission, an association which could only exist, if appellee's argument be sound, in defiance of express statute. The very fact that the Legislature thus gave at least implied sanction to associations which are distinctly recognized as possessing and exercising the power of "governing or controlling cars or rolling stock of railroads" (which is practically the extent of the authority of

car service associations, as it is their prime object) is strongly persuasive that such was not the control or management of business "to any extent" dealt with and condemned by paragraphs "g" and "h" of our anti-trust laws. The Legislature permitted them to exist as associations "governing or controlling cars or rolling stock of railroads," and this record shows neither the existence nor the exercise of any other authority of control by the Louisiana Car Service Association. Car service associations, like other representatives of corporations, have no authority save such as is specially intrusted to them, and have no power of control beyond the plain and well-defined boundary lines of their duty, and have nought to do with the earnings of the railroads composing their membership, have no connection with any traffic arrangements, are without power to institute suits or proceedings of any kind in the name or on behalf of any of their members, and are in no wise connected with the internal management or financial affairs or corporate policy of any railroad, having not even the power of fixing the demurrage charges which it is their duty to assess. The main end and purpose of their existence is to prove of benefit to consignor, carrier, and consignee by expediting the transportation of freight, facilitating its delivery, and insuring prompter and more satisfactory service by and for all alike. Car service associations are the agents and employees of the various railroads forming such associations. The salaries of the manager and his subordinates are contributed to proportionately by the different members, while within the scope of its employment and duty the association serves and represents all its members. Car service associations are simply the agencies employed by railroad companies for the convenient and accurate assessing of demurrage.

It is also undeniably true that in the instant case the manager of the Louisiana Car Service Association did not assume to have the authority, and in fact did not undertake, to "dictate or control the management of business" of appellant "to any extent" beyond the power granted to all car service associations by the rules of the Railroad Commission. Before the order of August 28th forbidding the switching of cars to appellee's warehouse in the future was issued, the same was submitted to the proper officials of the two railroads concerned, and received the approval of one, and was put into effect as to that road, while, upon the objection by the officials of the other, it was annulled and revoked as to it. This potential fact stands like a signboard at a parting of the ways, and points unmistakably to the correct conclusion. Is it not proof positive that the manager of the car service association, outside and beyond the rules formulated by the Railroad Commission, under which this particular association operates, is subordinate to the officials of the railroad to be affected by any special order which he may desire

to issue? No other hypothesis furnishes a reasonable explanation of these facts. If the manager was clothed with unlimited and unquestionable authority, what the necessity for conferring with the railroad officials prior to the issuance of the order? If the Louisiana Car Service Association was supreme, why should the order have been rescinded upon the mere objection of the superintendent of one member of the association? Whatever discretionary powers may be vested in the manager of the Louisiana Car Service Association generally, sure it is that this record disclosed no wrongful exercise or abuse thereof. In the absence of proof of injury or wrongdoing, courts will not indulge in inferences to effect the invalidation of contracts or agreements legal in form. But, aside from the evidence, the weakness which undermines appellee's position is an evident misinterpretation of the meaning of the statute when it forbids corporations placing the "control of the management of business to any extent" in the hands of others than their proper officers, agents, or employees. The argument seems to proceed upon the theory that "control to any extent" is a synonymous expression with "control of any part of its business." But this is erroneous. Every employee of a corporation is vested with power to control to some extent some part of the business of his master; but this does not come within the condemnation of the law, otherwise it would be impossible for any corporation to operate at all. The evil which the law was intended to prevent was the surrender by one or more corporations of their corporate functions, the delegation of the powers granted by their charters to other persons in no wise subject to or connected with such corporations, so that the business of the several distinct combining corporations would be managed, controlled, and dictated by these chosen trustees. This scheme, according to the most approved authorities, was the first form adopted by "trusts," and it was at this plan that the condemnatory anti-trust law was, in the first instance, directed. "Control" of the business of a corporation, within the meaning of all anti-trust legislation, so far as by our researches we have been able to discover, means power to dictate the corporate action of the corporation, not the mere management of some special, limited department of its operations. Noyes on Intercorporate Relations, § 294 et seq.; United States v. Northern Securities Company (C. C.) 120 Fed. 726, and cases cited. If this is not the correct view, it would be unlawful for connecting railroads to employ the same yardmaster, switchman, depot master, ticket agent, or other joint employees at union depots; for in the very nature of things each of such employees has "control of the management of business" of all the corporations which he represents in his particular, though limited, sphere of action. The car service association has no greater power. It, too, is confined within the strict limits of the

scope of its duty. If, then, a railroad by joining a car service association does not surrender its corporate autonomy, neither of the assumptions of appellee in this regard can be sustained by the proof. The car service association and its employees are the agents and representatives of the railroad, and the control (in the legal sense) of the business of the railroad is not "to any extent" vested in the car service association. It follows from this view that the question of how the membership of the executive board of the association is constituted is not material.

Again, it is said that under the provisions of section 7, c. 88, p. 128, Acts 1900, in suits like the present one, founded on that statute, "proof by any party plaintiff that he has been compelled to pay more for any service rendered by any corporation exercising a public franchise by reason of the unlawful act or agreement of the defendant trust, its officers, agents, or attorneys than he would have been compelled to give but for such unlawful act or agreement, shall be conclusive proof of damage," and thus proof of damage alone will entitle the plaintiff to recover the statutory penalty of \$500 for each instance of damage. The argument is presented in this form: The plaintiff has been compelled to "pay more for a service rendered" by the appellant, which is a "corporation exercising a public franchise." This is "conclusive evidence of damage"; ergo, the plaintiff is entitled to recover. The argument is adroit but specious. Its fallacy consists in this: it ignores the fact that, to enable the plaintiff to recover by the terms of the statute, he must have been compelled to pay more for some service "by reason of the unlawful act or agreement," and he must have been compelled to give more than he would have been but for such "unlawful act or agreement." Concede that appellee was compelled to pay more for the service of delivering his freight than were his competitors doing business and having warehouses on the same switch, was this because of any "unlawful act or agreement" on the part of appellant? By no means. Appellee himself refused to comply with the rules and regulations governing the delivery of cars to warehouses. Did appellee have to pay more for any service than he would have been required to pay but for some "unlawful act or agreement"? The answer must again be in the negative. Had there been no car service associations, no agreement between the railroads of any character, appellee must still have paid demurrage, and this charge was no more and no less, neither increased or diminished, by reason of the car service association. If there were no car service associations, railroads would still be entitled to demand car service and demurrage. This is settled beyond cavil or disputation, settled by custom and usage, by rule of the Railroad Commission, by prior decision of this court. *Elliott, Railroads*, § 1566, and note, § 1567; *State ex rel. v. Atchison, etc., Ry. Co.*, *supra*; *N. O. & N. E. R. R. Co. v. George*, *supra*.

We hold that a car service association is not such a "combination, contract, understanding, or agreement" as is condemned by our anti-trust law; that it is not "inimical to the public welfare," does not "infringe upon the rights of the individual or the general well-being of the state," and that it is not an abandonment of corporate autonomy or a delegation of corporate functions. *Elliott, Railroad*, § 1568; *Ky. Wagon Co. v. Ohio Ry. Co.*, 98 Ky. 152, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. Rep. 326; *Railroad v. Midvale Steel Co.*, *supra*. See, as illustrative, *State v. Terminal Ass'n* (Mo. Sup.) 81 S. W. 396. But, on the contrary, we find that its form is lawful, its aim and purpose legitimate, and its effect beneficial to the public, in that its operation tends to stimulate competition in business and increase the benefits arising therefrom. As the Louisiana Car Service Association is not a "trust or combine" within the meaning of chapter 88, p. 125, Acts 1900, so the appellant, by becoming a member thereof, did not subject itself to the penalties prescribed, and hence appellee is not entitled to recover the statutory penalty awarded by the statute to every one injured or damaged by the operation of a trust.

We have not thought it necessary to burden this opinion with extended extracts from authorities sustaining our position. These have been gathered from a vast field of legal research, and are systematically, accurately, and discriminately arranged in the briefs in this case, which are in themselves veritable storehouses of learning upon this and allied subjects. We content ourselves with a reference to them, and a bare citation of a few leading authorities from which we have deduced the general propositions herein announced. The conclusions arrived at upon the construction of our own statutes we give as the result of serious, prolonged, and mature consideration, in which we have not been unmindful of the gravity of the issues or the immensity of the interests involved.

Much that we have said in this connection applies with equal force to the claim of the appellee for actual damages said to have been suffered by reason of his having to haul his freight by team from the public delivery tracks of the railroad. And right here it becomes important to consider the relative attitude of the parties when the order not to switch cars for appellee was first put in force. The rule imposing demurrage for dilatoriness in unloading cars is binding upon consignees, even if they in fact be in ignorance of its existence. In a very recent case the Supreme Court of Pennsylvania says: "The further objection to plaintiff's claim is that it does not aver expressly or impliedly that these parties ever became parties to any contract for payment of demurrage on detained cars. But they were parties to the contract of shipment over plaintiff's railroad, and this is averred; and then, further, it is averred that since the de-

murrage rule was adopted it has formed part of the contract of shipment. This is sufficient averment of the implied contract. As a consignee of goods over plaintiff's railroad, it impliedly contracted to submit to all reasonable rules for the regulation of shipments. That the shipper was not consulted in framing the rules does not affect their validity. *Wagon Co. v. Ohio Railway Co.*, *supra*. There is no duty on a common carrier to consult either its shippers or consignees as to the wisdom of its rates of freight for carrying or rules for demurrage. As to the one, it cannot exceed a lawful rate; as to the other, it cannot exceed a reasonable charge. Within these bounds it is presumed, in the interests of its stockholders and the public, to properly conduct its own business." *Railroad v. Midvale Steel Co.*, 201 Pa. 630, 51 Atl. 313, 88 Am. St. Rep. 836; *Schumacher v. Railroad*, *supra*. The instant case falls clearly within this reasoning. The bills of lading under which appellant handle the cars giving rise to this litigation—"the contract of shipment"—contain an express provision that all car-load freight should be liable to charge for "trackage and rental" for detention, said charge to commence "after the expiration of forty-eight hours from its arrival at destination." This was appellee's contract with appellant, and the law imputes to him knowledge of its terms, and he was legally bound thereby. The soundness of this proposition was recognized by the trial judge. We quote from his opinion: "There was probably no legal excuse for plaintiff's conduct in the premises, for he was legally bound to observe any reasonable rules in force as to demurrage and car service." But it is further said that appellee's wrongful action did not justify the railroad company "in violating its common-law and statutory obligation" to appellee to deliver freight; this conclusion, of course, being founded on the principle that in the discharge of its duty to the public no corporation enjoying a public franchise can conduct its business according to the whim or caprice of its agents, or can arbitrarily, without special reason, refuse to serve any one seeking its service. Limiting that general principle to the matter here in dispute, it is likewise true that no carrier has the right on account alone of a dispute arising from a doubt as to the correctness of a particular bill or several bills for demurrage already past due, or an honest difference of opinion as to the justice of the charge on any number of cars already received and delivered, to refuse to "switch and place" other cars subsequently received. No carrier can refuse its services to any one desiring them on the ground alone of an unadjusted claim then pending, or on account of any previous violation of contract by such person, no matter how flagrant and inexcusable, if such person at the time the service is demanded is legally entitled thereto. A refusal on the part of the carrier for such case would entitle

the person aggrieved or injured to recover full compensation, and, if such action was dictated by vindictive motives, or by a desire to wantonly oppress and injure the particular person, the offending carrier would be liable to punitive damages as well. But this result follows not because the carrier was a member of a car service association, but by reason of the firmly established and rigidly adhered to rule of law which makes the master respond in damages, both actual and exemplary, for every wanton and willfully oppressive violation of duty by the servant, whether the servant committing the wrong be a car service association or other agent or employee. This principle of law is of universal application. It was the duty of the appellant primarily to "switch and place" all cars coming over its own line or tendered to it with proper "transfer switching charge" by any connecting line. It was the duty of the appellee to pay all freight charges and demurrage charges due on his freight and the cars containing the same. This, by contract entered into, evidenced by the bills of lading, he had bound himself to do. So long as appellee complied with his contract, he had the right to insist on faithful and prompt compliance on the part of appellant. More than this, even if, on account of doubts and disputes as to the correctness of justice of special instances of charge, freight charges or demurrage had been withheld pending adjustment, this would not of itself absolve the carrier from the discharge of its duty as to other car loads of freight subsequently received. No past violation of contract on the part of a consignee can justify a carrier in failing to discharge a present duty. But in the case at bar, according to the testimony for the appellant, not directly denied by appellee, appellee not only arbitrarily refused to pay demurrage charges which had accrued in the past, but expressed his intention of persisting in his refusal even should such charges be justly incurred in the future. If this be true, appellant was warranted in its refusal to further switch and place cars at appellee's warehouse. By delivering the cars at the warehouse appellant would have lost its lien, and could only have collected its charges from appellee directly, and he had already evidenced his intention of not paying. We know of no principle of law under which any one can announce an intention of not paying for a particular service, and still rightfully demand that such service shall be rendered; particularly where the charge for such service is admitted to be just and reasonable, and is in fact paid by all others who enjoy the benefit of it. And yet this is the attitude occupied by appellee if the testimony for appellant, uncontradicted in this record, be true. Nor is it true, as contended, that consignees are liable to imposition in the collection of demurrage charges because of the rule which requires that the payment of demurrage

bills shall not be unduly delayed, and that no claim of mistake or overcharge will be considered, unless the bill for demurrage, over which the dispute arises, has been first paid. Car service associations can collect demurrage only in the amount and under the circumstances permitted by the Railroad Commission. If they disregard those rules, and undertake to extort more, or to collect when not entitled thereto, they are liable to all the penalties prescribed against common carriers for disobedience of the mandates of the Railroad Commission. In addition the consignee would have his action for damages for any extortion which might be imposed on him by collecting more than was due, or for refusing to "switch and place" cars when no demurrage was due, and when the payment of no bill really due had been unduly delayed. In a suit for such damages the burden would be on the carrier to prove that such unpaid demurrage was properly assessed, was justly due, and payment thereof had been either refused or unduly delayed after demand for payment first made. As the duty is on the carrier to serve all patrons alike, in case of failure to do so it devolves on it to prove facts which, under the rule, justifies its action. The law affords ample protection to the consignee against both extortion and discrimination.

Appellee's contention that he had a right to refuse to pay because the bills of charges were made out by direction of the car service association and on its letter heads we mention simply to reject. They were made out in favor of appellant, were due to appellant, for services claimed to have been rendered by it, and appellant had the right to employ such lawful agency as it chose for the discharge of its private business. It would scarcely be seriously contended that a consignee who had repeatedly failed to pay transportation charges when the freight was delivered to him without prepayment being required could still rightfully demand that he be allowed to continue to remove the freight without first paying the charges. And yet the right of the railroad company to collect freight charges is no better established than is its right to collect demurrage in proper cases. One is for the transportation of the freight and the use of the cars in transit; the other for the use of its track and rental for the cars after they have arrived at their destination.

The evidence adduced on the trial proved conclusively that prior to the refusal of appellee to pay demurrage the same treatment was accorded him as all others similarly situated, and this makes manifest the accuracy of the statement quoted from the opinion of the trial judge that "there was no legal excuse for plaintiff's conduct in the premises." Inasmuch, therefore, as appellee himself violated the terms of his contract of shipment without "legal excuse for his conduct," and as the actual damages complained of were entailed on him as the result of his own act, this judgment cannot be sus-

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tained. One who himself first wrongfully breaches a contract has no standing in court when he seeks to recover damages caused by a failure of the other party to fulfill his part of the same contract.

Reversed and remanded.

HOUSTON & T. C. RY. CO. v. CITY OF DALLAS.

(Supreme Court of Texas, Jan. 26, 1905.)

[84 S. W. Rep. 648.]

Crossings—Conforming Tracks to Grade—Application of City Charter.

Dallas City Charter, § 113, gives authority to direct and control the "laying and construction" of railroad tracks, etc., so as to interfere as little as possible with the use of the streets, and to require that they be kept in repair, etc., and that the companies construct at their own expense crossings and other things, as the city council may deem necessary: *held*, that an ordinance so authorized, requiring railroad companies to reduce their tracks at crossings to grade, applies to tracks existing before its adoption as well as to those to be constructed.

Same—Same—Police Power.

An ordinance as authorized by Dallas City Charter, § 113, requiring railroad companies at their own expense to reduce their tracks at crossings to grade is the exercise of the police power over crossings, and not the exercise of a taxing power, or the power of eminent domain, as authorized by section 158, under which the expense would be borne by the city.

Police Power Not Subject to Limitation of Power of Eminent Domain.

The limitation on the power of eminent domain, that property shall not be taken or damaged for public use without adequate compensation, does not of itself impose any restriction on the proper employment of the police power on any subject lying within its sphere in a proper and lawful manner.

Conforming Tracks to Grade—Validity of Ordinance.

It is no objection to a city ordinance requiring railroad tracks to be reduced at crossings to grade that it would require the roadbed also to be reduced between crossings.

Same—Mandamus—Sufficiency of Petition.

A petition for mandamus to compel a railroad company to reduce its tracks in the city to the level of certain street crossings, which alleges the height of the embankment above the street at each crossing, with a demand that the crossing of the street be made level, gave the defendant sufficient information as to the action required of it.

Same—Police Power—Due Process of Law.*

An ordinance pursuant to Dallas City Charter § 113, requiring the tracks of railroads to be constructed at grade on crossings, is in the exercise of the police power, and hence is not an ordinance taking property without due process of law.

Same—Reasonableness of Ordinance.

In an answer to petition for mandamus to compel a railroad company

*As to the power to compel railroad companies to construct and maintain crossings so as to subserve the safety of highway travelers, see foot-note appended to Nashville, etc., R. Co. v. Witherspoon (Tenn.), 11 R. R. R. 740, 34 Am. & Eng. R. Cas., N. S., 740; Illinois Cent. R. Co. v. Swalm (Miss.), 11 R. R. R. 118, 34 Am. & Eng. R. Cas., N. S., 18 (duty to make bridges and crossings over streets and highways subsequently laid out); Detroit, etc., R. v. Osborn (U. S.), 7 R. R. R. 456,

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to reduce its tracks to the level of certain street crossings in the city because of the existence of danger to the public caused by them, an answer denying that the crossings are more dangerous than those to be substituted for them, and denying that the difference in the changes will be so great in favor of those contended for by plaintiff as to justify the imposition of a burden on the respondent, which will result from the making of the changes, a demurrer striking out the answer was erroneous, as the allegations in such answer must be treated as true, and are sufficient to show that the ordinance relied on is unreasonable and arbitrary, entitling defendant to a hearing on the evidence.

Same—Same—Mandamus—Defenses.

On application of the city for mandamus to compel a railroad company to reduce the grade of its track at street crossings to the street level, an answer showing the impracticability of complying with the ordinance states a good defense.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action for mandamus by the city of Dallas against the Houston & Texas Central Railway Company. A judgment for plaintiff was affirmed by the Court of Civil Appeals (78 S. W. 525), and defendant brings error. Reversed.

Baker, Botts, Parker & Garwood, R. De Armond, and W. J. J. Smith, for plaintiff in error.

W. T. Henry and Jas. J. Collins, for defendant in error.

WILLIAMS, J. Section 54 of the charter of the city of Dallas gave to the city council control and power over the streets, alleys, crossings, and highways of the city, and power to abate or remove all encroachments or obstructions thereon; to open, widen, extend, regulate, grade, pave the streets, and to protect same from encroachments and injury of any kind whatsoever. Section 59 conferred power to regulate, establish, and change the grade of all sidewalks, streets, and premises, and to require and compel the filling up and raising same. Section 113 gave authority "to direct and control the laying and construction of railroad tracks, turnouts and switches, and to require that they be constructed and laid so as to interfere as little as possible with the ordinary travel and use of the streets, and to require that they be kept in repair. To regulate the use of locomotive engines, to direct and control the location of cable and other street and railroad tracks, and all steam railroad tracks, and to require railway companies of all kinds to construct at their own

30 Am. & Eng. R. Cas., N. S., 456; *Town of Clarendon v. Rutland R. Co. (Vt.)*, 6 R. R. R. 1, 29 Am. & Eng. R. Cas., N. S., 1; *Philadelphia & B. C. R. Co. v. Upper Darby Tp. (Pa.)*, 2 R. R. R. 760, 25 Am. & Eng. R. Cas., N. S., 760 (in absence of statute grade crossing of a street or highway cannot be restrained); note, appended to *Williams v. New York, N. H. & H. R. Co. (Conn.)*, 12 Am. & Eng. R. Cas., N. S., 860; note, 16 Am. & Eng. R. Cas., N. S., 599 (power to abolish grade crossings); note, 8 Am. & Eng. R. Cas., N. S., 613 (powers of railroad commissions); *Chicago, M. & St. P. Ry. Co. v. City of Milwaukee (Wis.)*, 9 Am. & Eng. R. Cas., N. S., 537.

expense such bridges, turnouts, culverts, crossings and other things, as the city council may deem necessary. To regulate the speed of all railroad trains within the city limits, and their stops at street crossings, and to require said companies to keep the streets through which they run in repair, and to light the same whenever deemed necessary, and to prescribe the kind of light to be used, and to levy special taxes or assessments against such roads for street improvements, the same as against property owners." Section 158 provided a method by which the city council was empowered to "grade, fill, raise, repair, macadamize, remacadamize, pave, repave, or otherwise improve" its avenues, streets, and alleys, and provided that all such improvements should be entirely at the cost of the city, except that the owners of railroads operated "on such street, avenue, or alley" were required to pay for improving the part of the streets between the rails and between the tracks and for two feet on each side of the rails, etc., to secure and enforce which payment a procedure is prescribed. On the 23d day of November, 1901, this action was begun by the city for a mandamus to compel the plaintiff in error, as respondent, to reduce its tracks in the city to the level of certain streets at crossings mentioned in the petition. The allegations are, in substance, that the respondent operates its road through the city approximately north and south; that the part of the track extending from Pacific avenue, on the south, to the corporate line, on the north, a distance of about a mile and two-thirds, is upon an embankment ranging from nine-tenths of a foot to four and seven-tenths feet high, causing the track to stand at a considerable elevation above the adjacent land; that numerous streets, including twelve which are named, cross the embankment and track, all of which are much used by the public; that at the crossing of each street the embankment is an obstacle and impediment to the free and convenient and safe and satisfactory use and enjoyment of the streets by the public for ordinary travel. The petition then gives the elevation of the track above the streets at each crossing, and proceeds to allege that it is essential to the public convenience and safety that at the crossing of such streets the track should be reduced to the grade of the street; that in pursuance of power granted in its charter the city council, on the 9th day of October, 1901, adopted the following ordinance:

"Be it ordained by the city council of the city of Dallas:

"Section 1. That all railroad tracks in the city of Dallas shall be laid and constructed and so kept and maintained as to interfere as little as possible with the ordinary travel and use of the streets crossed by such railroad track, or tracks, by the owners of such tracks, and at their expense.

"Sec. 2. That whenever and wherever any railroad track or tracks cross or intersect any street of the city of Dallas, the person, association, or corporation owning said track or

tracks shall keep and maintain the same at a grade with the street on either side of the crossing, and whenever at any crossing with any street of the city of Dallas any railway track is either above or below the grade of the street crossed, such track or tracks shall, by the owner thereof, be reduced or elevated, as the case may be, to conform with the grade of the street intersected, and such crossing shall be made to conform to the grade of such intersected street entirely at the expense of the person, association or corporation owning the track or tracks crossing the street.

"Sec. 3. That after the track or tracks have been reduced or elevated to grade of the intersected street, as above provided, it shall be the duty of the owner of the track or tracks to place and maintain the crossing in such a condition as to interfere as little as possible with the ordinary travel and use of the street."

That the respondent, in disobedience and violation of such ordinance, continues to maintain its embankment and tracks as stated, and that the plaintiff has no other adequate remedy than a mandamus to compel a reduction of the grade, etc. The prayer was for a writ to compel the respondent to reduce its track to conform to the grade of the streets as required by the ordinance.

In its answer the respondent by general demurrer and special exceptions raised the following objections to the petition: (1) The ordinance set up is void for want of power in the city council to pass it, the provisions of the charter relied on as a grant of such power applying only to the laying and construction of railroad tracks after the passage of the charter and there being no allegation that this track was of this class. (2) The ordinance itself was not intended to apply to tracks already laid, but only to such as should be laid after its adoption. (3) The plaintiff sought to require respondent to reduce its grade, not only at street crossings, but between them, when the charter only applied to crossings. (4) That the change proposed by the city in the grade of the crossings is in reality an attempt on its part to regrade its streets, which is controlled by section 158 of the charter, requiring the city to pay its proportion of the expense thereof; whereas the city seeks to have the respondent make the change and pay the entire expense. (5) That such action would be a taking and damaging of respondent's property for no public use, and without compensation. (6) That the petition does not allege the respective grades of the streets with reference to each other or with reference to any other grade, nor show that plaintiff has ever furnished to respondent information of such grades so as to enable it to comply with plaintiff's demand.

The answer charged that the ordinance relied on by plaintiff was unreasonable and oppressive, and was an effort to take respondent's property without compensation, and with-

out due process of law, and contained, in support of this charge, a statement of facts, which may be condensed as follows: (1) That the embankment is not a menace or danger to public travel, but the crossings over it are safer and more advantageous to the public than they would be if flush with the street. (2) That it owns its right of way and has operated its road, as now constructed upon the embankment, for 29 years; that the greater portion of the grade complained of was made and used at a time when the limits of the city did not embrace it, and when there were no streets across it; that afterwards the corporate limits had been so enlarged as to include it and streets then extended across it as it now stands, since which time it has used its track as constructed with the knowledge, acquiescence, direction, and consent of the city. (3) That a compliance with plaintiff's demand would require an expenditure of more than \$50,000 for the actual work, and, in addition, respondent's traffic over its road would be suspended or seriously embarrassed and delayed, causing much more loss, the right of way being too narrow to enable respondent to so reduce its grade without suspending entirely all traffic over its track. (4) That compliance with the ordinance is impracticable, if not impossible, because (a) the grades of the streets are so different from each other (the difference being specified in the answer) that the track, if reduced to the grade of each crossing, instead of being reasonably safe and level, would form a series of undulations or alternating sags and elevations, rendering the operation of trains over it dangerous, if not impossible; (b) the proper construction of the crossing and grading of the street thereat would, in a manner specified, throw the surface water collecting in the streets and heretofore passing along the gutters in other directions upon the roadbed, making it a channel or sluiceway for the rain and storm waters, and rendering it unstable, insecure, and dangerous to life and property; the only means of preventing which would be the construction by respondent of a sewer, of the character designated in the answer, two miles in length, at a cost of \$60,000. (5) That defendant owns its right of way fenced from adjoining property and abutting upon each side of the several streets, and that the proposed action of the city is an attempt to regrade its streets, the consequence of which would be to take and damage respondent's said abutting property without compensation. (6) That the ordinance denies to respondent the equal protection of the law, in that other named railroad companies are permitted, without hindrance or molestation by the city, to operate their trains upon embankments intersecting streets, which embankments are as high and higher than that of respondent, and the city had signaled out defendant to compel it to lower its grade when it allows every other railroad in the city to maintain tracks across public traveled streets where the embank-

ment is higher than that of respondent. (7) That respondent's road south of that part involved in this action is also upon an embankment crossed by public streets, and that, should it be required to lower its grade at the crossings now in controversy, the city would hereafter require it to take like action at the other crossings, and in such event the grade north of the Texas & Pacific Railroad, to be established in this suit, would not correspond with the new grade which the city will require to be established south thereof. (8) That the city has an adequate remedy for the evil complained of under another ordinance, which is set forth, and which provides, in substance, that railroad companies having tracks in the city of Dallas shall raise or lower the grade of same when required by the city council, and imposes penalties for a failure to comply after a prescribed notice, and also authorizes the city to make the change and maintain suits against the companies for the expense thereof.

The plaintiff excepted generally and specially to this answer, the special exceptions Nos. 1 to 10, inclusive, applying respectively to parts of the answer as constituting no obstacle to the exercise of the police power by the city as follows: The first, second, third, and fourth exceptions, to the allegations as to the establishment and operation of the road before the city limits included it and the subsequent extension of such limits and of the streets across the road, and the existence of the present crossings with the knowledge and acquiescence of the city; fifth, to the averments of inconvenience and expense to defendant in complying with the ordinance; sixth, to the charge of unreasonableness against an ordinance passed in the exercise of express and specific power from the Legislature; seventh, to the averments of damage to respondent's abutting property; eighth, to the allegations of a denial of the equal protection of the law for failure to show wherein there was such denial; ninth, to the allegation as to the embankment south of the Texas & Pacific Railroad and as to plaintiff's future action with respect thereto; tenth, to the allegations setting up the penal ordinances as an adequate remedy.

At the trial in the district court the respondent's exceptions to the petition were overruled, and plaintiff's special exceptions to the answer were presented seriatim, and sustained, and the general demurrer was presented and sustained, and, as respondent declined to amend, the entire answer was stricken out, and judgment was entered upon the allegations in the petition awarding the mandamus as prayed for.

1. Do provisions of the charter and of the ordinance, on which the suit is founded, apply to railroad crossings existing before their adoption? Section 113 of the charter is the one specially relied on as supplying authority; and we may confine our attention to it. The most natural application of

the language of its opening sentence, "To direct and control the laying and construction of railroad tracks," etc., is to the original laying and construction, and power to require changes in the position of tracks already existing is not here clearly expressed. The further language of this sentence pursues the same thought, and, if the question whether or not power is conferred on the city council to require a change in the location of tracks previously laid depended on this sentence alone, there would be difficulty in answering it affirmatively. But the second sentence removes the difficulty by conferring power "to require railway companies of all kinds to construct at their own expense such bridges, turn-outs, culverts, crossings, and other things, as the city council may deem necessary." This provision is clearly designed to grant to the council that police power usually conferred upon such bodies over crossings and like subjects. A street and a railroad track may cross each other upon the same surface, or one may pass above or below the other by means of a bridge, or viaduct, or tunnel. The crossing in contact at the same surface may be upon an embankment, or the street and the track may occupy the same level. The charter, in conferring power to require the construction of such "bridges, crossings, and other things, as the city council may deem necessary," expressly commits to that body authority and discretion to determine the character and construction of crossings and other things incident thereto, so far as this involves only a legitimate and proper exercise of the ordinary police power over such subjects. The adoption of the ordinance was a plain attempt to exercise the police power, and no other; and to so apply it as to remedy what was thought to be an evil existing in the condition of the street crossings. The rule that legislative acts are not to be construed as acting retrospectively unless the intention that they should do so clearly appears, has no application. The proper operation of such legislation as this is wholly prospective, in that it seeks to remedy, for the future, evils requiring correction which have already grown up. It is merely the exercise of the power subject to which all persons use the public highways for their own purposes to so regulate such use as to secure the rights therein of the people generally, and protect them in the safe and convenient enjoyment thereof. The power exists at all times in the Legislature and in those inferior governmental bodies to whom it may be properly committed, and its proper exercise as unrestricted by the mere previous existence of property rights. Therefore the construction of the language of such a measure is not controlled by the principle of construction invoked by respondent. *C. B. & Q. Railway Company v. Chicago*, 166 U. S. 252-254, 17 Sup. Ct. 581, 41 L. Ed. 979. The language of the charter applies to railroads of all kinds, and there is nothing either in it or in the nature of the power to restrict

its operation to railroads to be thereafter constructed. The ordinance is equally plain.

2. To the contention that it appears from the petition (a) that the work of reducing the track at the crossings to the level of the streets should be controlled by section 158 of the charter, and the expense thereof shared by the city and respondent, as provided by that section; and (b) that the reduction of its embankment at the expense of respondent would be a taking or damaging of its property without compensation—the same answer may be made, which is that the suit of the city is not an attempt to assert either the power of taxation by local assessment, as given in section 158, nor the power of eminent domain, but is an assertion of the police power over crossings, the validity of which must be tested by the principles applicable to that power. Section 158 was intended to confer upon the city the power to improve its streets by the species of special taxation for local improvements defined therein. It does not limit nor detract from the police power vested in the city council to regulate in any way in which that power may be legitimately exercised, the use of the streets by railways at crossings. *Lentz v. The City of Dallas*, 96 Tex. 265, 72 S. W. 59, and authorities cited. Nor does the limitation upon the power of eminent domain that property shall not be taken or damaged for public use without adequate compensation of itself impose any restriction upon the proper employment of the police power upon any subject lying within its sphere of operation. The question in all such cases is not merely whether or not property is damaged or loss inflicted through the exercise of the power of the government to safeguard the lives and limbs of its citizens, but whether or not the action taken or attempted falls within the legitimate scope, and is a lawful exercise of that power, which question will be discussed later. It cannot be seen from the allegations of the petition alone that the action taken by the city council exceeds its power over such subjects.

3. The complaint that the plaintiff seeks to compel the removal of the embankments not only at the crossings, but between them, is not sustained by the prayer in the petition. The plaintiff concerns itself only with the condition of the track at crossings, leaving to respondent to make such adjustment of the remainder of its roadbed as may be made necessary by a compliance with the demand made upon it. The court can, however, see from the facts stated in the petition, that, if the track should be reduced at the crossings, as demanded, it would become necessary to the preservation and practical operation of the road that the rest of the embankment be correspondingly reduced, and that this would in all probability result, practically, in a complete change in the grade of respondent's roadbed throughout the distance mentioned in the petition. If this fact alone would consti-

tute a bar to the proposed action, it would, we think, follow that the general demurrer is good. But we do not think such is necessarily the case. This is only one fact, to be considered in connection with others, in determining whether or not reasonable and just occasion exists to sustain the demand of the city for the change of crossings. If that question be determined in its favor, it has a right to require the change, which would not be defeated by the necessity for other incidental alterations thereby made necessary in respondent's roadbed.

4. The petition alleges the height of the embankment above the street at each crossing, and this, with the demand that the crossing be made level, gave the defendant sufficient information as to the action required of it.

We thus reach the conclusion that the propositions urged by respondent in support of its general and special exceptions should not be sustained, and this brings us to the rulings of the court upon exceptions to its answer.

5. The contention is renewed in connection with the allegations of the answer that the facts stated therein show that the action sought by the city would constitute a taking and damaging of its property without compensation, and without due process of law. That compensation is not required to be made for such loss as is occasioned by a proper exercise of the police power has already been stated. It is equally true that the infliction of such loss is not a taking without due process of law. The exertion of the police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law. The distinction between these powers may now be elaborated by reference to a few of the authorities. In *Railway v. Chicago*, supra, this language is used by Justice Harlan: "The plaintiff in error took its charter subject to the power of the state to provide for the safety of the public in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the Constitutional, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the

people." In *N. Y. & N. E. Railroad v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269, it was held that a railroad company could, by the proper proceedings, be required, at great expense to itself, to take up its track where it crossed a highway at grade, and construct another crossing, not at grade, when the public safety demanded the change. This doctrine is sustained by many other authorities. *Elliott on Railroads*, § 1109, and authorities cited.

There is some conflict among the authorities as to what a railroad company may be required to do at its own expense in the construction of crossings, but the weight of authority sustains the views expressed by Mr. Justice Harlan, and such is the position of this court. *G. C. & S. F. R. R. Co. v. Milam County*, 90 Tex. 357, 38 S. W. 747; *G. C. & S. F. R. R. Co. v. Rowland*, 70 Tex. 303, 7 S. W. 718. The conflicting cases have arisen when new streets or other highways were being opened across existing railroads, and the question was as to the extent to which compensation must be made to the railway companies. All of the courts agree that the companies are not entitled to be paid the expense of doing those things which may properly be required of them by virtue of the police power to secure the safety of persons using the crossings, but differ as to what things are within that category. In this case the streets are already established—properly, we must assume—across the railroad, and there is no effort to apply the power of eminent domain. The existing crossings, as the city contends, are so dangerous to life and so inconvenient to travel as to require that the proposed changes be made. In the cases relied on by respondent no such condition had arisen, and they are therefore not authority upon the question under consideration, which is as to the competency of the police power to require the correction of an evil demanded by the public welfare.

Another case (*Seattle v. The Columbia Railway* [Wash.] 33 Pac. 1048), so much relied on by respondent, may be distinguished in the same way. The railway had lawfully acquired the right to construct and had constructed its track along a street of the city of Seattle, and its property, including its track, had been destroyed by fire, its franchise to occupy the street remaining. It began rebuilding its track, when it encountered a raised cross-street which had been elevated by the city in regrading its streets, so that the track could not be built across it upon the grade which it had formerly occupied, and the controversy arose over the right of the railway company to cut through the regraded streets. The court held that the action of the city amounted to a destruction of the company's franchise to occupy the street as formerly, and that this could not be done without compensation. The right of the city to grade its streets was admitted, but it was said that the right "was not an absolute one, to be exercised at its option, regardless of its effect

upon others, but its power must be reasonably exercised with reference to the rights of parties interested." This doctrine has its application, as will presently be seen, to the question as to the validity of the attempted exercise of its police power by the city in this case, but the decision is not authority for the broad proposition that, although the situation be such that the demand of the city is, under all the facts and circumstances, a necessary or a just and reasonable requirement to promote the safety of the public, the fact that the enforcement of it will inflict pecuniary loss on the respondent is a complete bar. There was no contention in that case that the railroad company was maintaining a crossing dangerous to persons using it, and the opinion had no reference to the question before us.

The power of the Legislature to regulate the use of property and the carrying on of business so as to protect the health, safety, and comfort of citizens is recognized by all of the authorities, and its use is not to be defeated by the mere fact that loss or expense may be imposed upon the owners of the property or business. *Fertilizing Company v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036. The numerous cases on the subject of nuisances in this court and elsewhere are but instances of the use of this power. So the decisive question, as we have said before, is whether or not the action of the city is sustained by the existence of facts affecting the public welfare sufficient to justify such an application of the police power, and the answer to this question determines the one made by respondent as to whether or not the action of the city constitutes due process of law.

6. The power is not an arbitrary one, but has its limitations. It is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort, and convenience as consistently as may be with private property rights. As those needs are extensive, various, and indefinite, the power to deal with them is likewise broad, indefinite, and impracticable of precise definition or limitation. But as the citizen cannot be deprived of his property without due process of law, and as a privation by force of the police power fulfills this requirement only when the power is exercised for the purpose of accomplishing, and in a manner appropriate to the accomplishment of, the purposes for which it exists, it may often become necessary for courts, having proper regard to the constitutional safeguards referred to in favor of the citizen, to inquire as to the existence of the facts upon which a given exercise of the power rests, and into the manner of its exercise, and if there has been an invasion of property rights under the guise of this power, without justifying occasion, or in an unreasonable, arbitrary, and oppressive way, to give to the injured party that protection which the Constitution secures. It is therefore not true, as urged by plaintiff, that the judgment

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of the legislative body concludes all inquiry as to the existence of facts essential to support the assertion of such a power as that now in question. If this were true, it would always be within legislative power to disregard the constitutional provisions giving protection to the individual. The authorities are practically in accord upon the subject. A few quotations will indicate the scope of the inquiry as far as it can be abstractly defined. In *Dobbins v. Los Angeles*, 25 Sup. Ct. 20, 49 L. Ed. —. The law is thus stated by the Supreme Court of the United States: "It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But, notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments, undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property. In *Lawton v. Steele*, 152 U. S. 133-137, 38 L. Ed. 385-388, 14 Sup. Ct. 499-501, Mr. Justice Brown, speaking for the court, said upon this subject: 'To justify the state in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.' And again, in *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. 383, the same justice, again speaking for the court said: 'The question in each case is whether the Legislature had adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class.'" After quoting other authorities to the same effect, the court uses this language: "But the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary

enactment. It was averred that the works would be so constructed as not to interfere with the health or safety of the people. No reasonable explanation for the arbitrary exercise of power in the case is suggested." In the case before us we have only a municipal ordinance to deal with, and it is the well-established doctrine in this and other courts that the question as to the reasonableness or unreasonableness of such ordinances is open to inquiry in the courts. *Milliken v. City Council*, 54 Tex. 388, 38 Am. Rep. 629; *Mills v. Railway*, 94 Tex. 247, 59 S. W. 874, 55 L. R. A. 497. An exception to this rule is that the reasonableness vel non of an ordinance cannot be thus questioned if it be expressly authorized by the Legislature, and be a regulation which the Legislature itself has power to adopt and enforce. But aside from the fact that there are limitations upon the power of the Legislature itself over such subjects as that before us, this ordinance is not, in our opinion, within the exception. As we have already pointed out, the crossings of streets and railroads may be variously arranged, and the kinds of crossings to be adopted in particular situations are, in Dallas, committed to the discretion of the city council. The Legislature has not itself determined the character of any one to be adopted at any place. The full police power over the subject is granted to the city council, but to be used in subordination to the limitations upon such a power when vested in such a body, one of which is that its exercise must be reasonable. Even if the power claimed by the city should be derived from the first sentence of section 113 of the charter, the result would not be different, because the Legislature has not said what manner of "laying and construction will interfere as little as possible with the ordinary travel, and use of the streets," but has left that also to the discretion of the city council; and it is the judgment of that body alone that the character of crossing defined by the ordinance should be required, which leaves the ordinance as open as others to examination on a charge of unreasonableness.

The position is taken that the question as to reasonableness is one of law for the court, and not of fact to be decided on a hearing of evidence; from which the conclusion is urged that the trial court, when hearing exceptions, properly held the ordinance to be valid. It is doubtless true that the question is one of law. The reasonableness or unreasonableness of many ordinances will appear on their faces, and the court may, upon mere inspection, pronounce them to be valid or invalid. In others the question may depend upon their operation upon particular persons or conditions of fact which cannot be known to the court until made to appear by evidence. Their effect may be just and reasonable in general, but in particular instances may be arbitrary and oppressive to the extent of invading fundamental rights. *Evison v. Chicago, etc., Ry. Co. (Minn.)* 48 N. W. 6, 11 L. R. A. 436; *State v.*

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City of Trenton (N. J.) 20 Atl. 1076, 11 L. R. A. 412. In such cases the court can only determine as to the validity or invalidity of the ordinance when the facts upon which the question depends are established; and, if they are in dispute, they are to be determined like other matters of fact, the question of validity still being one of law for the court to decide. When the case is tried by a jury the court is, of course, to instruct as to the law applicable to the differing states of fact which the evidence may tend to establish as in other cases. The court in this case, looking at the ordinance alone, could not say that it is void. As was said by the Supreme Court of Minnesota in the *Evison Case*, *supra*: "Much must be left to the judgment and discretion of the city council, and when they have exercised their judgment and discretion in passing an ordinance it is *prima facie* valid, and, to justify a court in setting aside the action, its unreasonableness, and the want of necessity for it as a measure for the protection of life and property, must be clear, manifest, and undoubted, so as to amount, not to a fair exercise, but an abuse, of discretion, or a mere arbitrary exercise of the power of the council. [Citing *Knobloch v. Chicago M. & St. P. R. Co.*, 31 Minn. 402, 18 N. W. 106.] But where it clearly and manifestly appears that the ordinance is unnecessary and unreasonable the courts have the undoubted right to declare it void."

The ordinance being *prima facie* a valid one, it was incumbent upon the respondent to show the contrary by facts stated in its pleading. This it undertook to do, and the question upon demurrer to the answer was whether or not the ordinance, in its operation upon respondent, when judged by the facts pleaded, was unreasonable and arbitrary, and we are of the opinion that it was decided incorrectly. The court doubtless acted upon the opinion that the respondent could not thus question the action of the city council, and the Court of Civil Appeals took the same view, which we have held to be an erroneous one. The authorities relied on do not sustain the position. In the cases in which such exercise of the police power has been sustained, the parties were heard by the courts when they alleged facts to show that the measures taken against them were unreasonable, arbitrary, and oppressive, and the actions brought in question have been upheld only when the parties attacking them failed to sustain their charges by the evidence. Thus, in the *Bristol Case*, *supra*, while the action of the authorities in requiring an abolition of the grade crossing was sustained, this significant language was used: "The objection is not that a hearing was not required and accorded, which it could not well be in view of the protracted proceedings before the commissioners and the superior court and the review in the Supreme Court, but that the scope of inquiry was not as broad as the statute should have allowed." The opinion then carefully examines this

contention, and finds that the issues which had been tried were broad enough to embrace every fact essential to sustain the assertion of power in question, among which issues were these: "Whether or not the great crossing ordered by the commissioners to be removed was in fact a dangerous one, and whether or not the company's financial condition was such as to warrant the order." So, in the Fertilizing Company Case, a hearing was given to it by the court upon its application for an injunction to restrain the action being taken against it by the municipal authorities, and the facts sustaining the propriety of such action ascertained, before it was adjudged to be a lawful exercise of power. A like hearing was ordered in *Dobins v. Los Angeles*, supra, and in *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970, and in all of the other cases cited in which the attempted exercise of the police power was challenged by allegations of facts showing unjust and arbitrary action a hearing upon the facts as either had or ordered by the appellate court.

7. Coming to the case made by the answer, we see that it puts in issue the very fact the existence of which is assumed in the effort to abolish these crossings, which is the existence of danger to the public caused by them, and to be remedied by the proposed change. Some of its allegations are general, but not more so than those of the petition to which they are a reply. It is said in argument that the court may know that there is danger to travelers in the use of the present crossings, and so we may; but, without knowing the facts of the situation, we cannot know the extent of the danger, nor that the crossings are more dangerous than those to be substituted for them. This is the precise issue the answer makes. Much less can we know that the difference in the advantages of the two characters of crossings will be so great in favor of those contended for by plaintiff as to justify the imposition of such a burden upon respondent as the allegations show will result from the making of the change. If it be true that there is to be no benefit to the public from the proposed change, or a benefit which is inconsiderable when compared with the detriment to be suffered by the respondent, who will say that it is just and reasonable to subject respondent to such expense and loss as is averred? The petition itself so couples together its allegations of danger with those of mere convenience as to leave it doubtful how far the consideration of each has weighed in determining the city's action. While the convenience of the public in the use of the streets is generally to be considered and promoted, it may well be that in particular instances it should not be allowed to outweigh, in the adoption of such measures as that under consideration, a great and disproportionate injury to be inflicted on private interests in advancing it. When it is found that a proposed action is to be fraught with such

consequences as those averred in the answer, a public exigency correspondingly great and urgent should be required in its support. In considering this phase of the case at present, we can only treat all of the relevant facts well pleaded as true, and announce our opinion that they are sufficient to show the ordinance relied on to be unreasonable and arbitrary in its operation against respondent, and to entitle it to a hearing on the evidence.

8. There is another feature of the answer, which, in our opinion, contains a good defense, and it consists in the showing of the impracticability of complying with the ordinance. The ordinance is not intended to destroy the road, nor to render impracticable its efficient operation. The rule declared by it as to crossings is general, and, if obedience to it is, in any instance, not reasonably practicable, not only should it be held to be unreasonable in such operation, but the intention that it should so operate ought not to be imputed to the city council. If it be true, as urged by counsel, that upon sufficiently urgent public necessity the owner of a railroad track may be required to entirely remove it, the answer is that no such requirement has been made, the ordinance contemplating that the road shall remain where it is, and be operated efficiently. Hence the action of the city should not be regarded as intended to cripple respondent so that its duties cannot be properly performed. Besides, a court will hardly grant a mandamus to require the doing of that which is shown to be impracticable.

9. From what has been said it follows that we are of the opinion that the general demurrer and special exceptions 1, 2, 3, 4, 5, 6, and 9 should have been overruled. The facts to which these special exceptions relate were properly stated as affecting in greater or less degree the questions as to the unreasonableness of the ordinance.

10. The seventh, eighth, and tenth special exceptions were properly sustained for reasons which we will briefly state: (1) The allegations concerning the damage to respondent's abutting right of way are wholly irrelevant to the inquiry. Respondent holds its estate in its right of way subject to such effects as may follow from proper requirements as to crossings, and its existence has no influence on the validity of the ordinance. (2) It is the ordinance alone which the answer alleges denies to respondent the equal protection of the law. It applies to all railroads, and on its face shows no discrimination. No facts are stated showing that it is so enforced as to produce the result complained of, the allegations as to the singling out of respondent being too indefinite to show any real discrimination, and probably having no support beyond the fact that respondent was first sued. (3) The ordinance of 1898 relied on as giving another adequate remedy cannot be regarded as having that effect. The duty sought to be enforced is that sought to be imposed

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by the last ordinance—that is, that respondent shall itself construct the crossings—the former ordinance only authorizing prosecutions or the doing of the work by the city. It furnishes no specific remedy to enforce the duty prescribed by the last ordinance, which, if valid, is properly enforceable by mandamus. Besides, the validity of the former ordinance is open to the same attack as that made upon the latter, and to others, viz., that it seeks to give power to the city to tear up and disturb railroad tracks whenever the city council may require a lowering or elevating thereof. It is unnecessary to pursue this subject further, as it is apparent that there is not a plain, adequate, certain, and speedy remedy given by the ordinance.

For the error in sustaining exceptions to the answer, the judgment is reversed, and the cause remanded.

Reversed and remanded.

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(Supreme Court of Alabama, Dec. 20, 1904.)

[37 So. Rep. 796.]

Injury to Brakeman—Negligence of Engineer—Pleading.

In an action for injuries to a railroad brakeman, an allegation of the complaint that plaintiff's injuries resulted from the negligence of the engineer, in that he was running the engine at a dangerous and reckless rate of speed, so that some of the cars were derailed and plaintiff thrown from the top of a car and injured, was a sufficient averment of negligence.

Same—Failure to Repair Track—Pleading.

In an action for injuries to a railroad brakeman an averment of the complaint that the defect in defendant's track arose from, or had not been discovered or remedied owing to, the defendant's negligence or the negligence of some person in the service of defendant and intrusted by the defendant with the duty of seeing that the track was in proper condition, was a necessary averment under the statute, and sufficient although it did not allege the name of the person intrusted with the duty.

Same—Designation of Negligent Employee.

In an action for injuries to a railroad brakeman, a count of the complaint alleging that the injuries were caused by the negligence of one — G. was sufficient without an allegation that plaintiff had made diligent effort to ascertain the party's full name, but had failed to ascertain it.

Same—Defective Track—Opinion Evidence.

In an action for injuries to a railroad brakeman a witness shown to be experienced in track construction was competent to give his opinion that the track where the train was derailed was in a defective and unsafe condition.

Same—Dangerous Speed—Expert Testimony.

In an action for injuries to a railroad brakeman, one who has had long experience as a brakeman, and whose duties were concerned with the regulation of the speed of the train under varying circumstances of curve and grade, and who knew what was understood to be a safe rate of speed down the grade and around the curve at the point where the train was derailed, was competent to give his opinion as an expert as

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to whether the rate of speed of the train at the time of the accident was a dangerous one.

Same—Cause of Derailment.

In an action for injuries to a railroad brakeman owing to the derailment of the train, *held*, that the evidence was sufficient to warrant a finding that the derailment of the train was caused by certain defects in the track.

Same—Insecure Ties—Pleading and Proof.

In an action for injuries to a railroad brakeman owing to the derailment of a train, evidence that the ties at the point of the accident were rotten amounted to proof of an allegation of the complaint that the rails were "insecurely fastened to the cross-ties."

Same—Negligence—Excessive Speed.

In an action for injuries to a railroad brakeman, evidence *held* to warrant a finding that the engineer was guilty of negligence in running the train at an excessive speed.

Same—Assumption of Risk.*

A railroad trainman does not assume the risks of defective track conditions.

Appeal from Circuit Court, Colbert County; Ed. B. Almon, Judge.

Action by R. E. Shea against the Northern Alabama Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The fifth, sixth, and eighth counts of the amended complaint (demurrers having been sustained to the other counts) contain the following averments: "(5) And plaintiff avers that his injuries resulted from the negligence of ——— Gould, whose given name is unknown to the plaintiff, and who was the engineer in charge of the engine which was pulling a train of cars on the defendant's road, and said negligence consisted in this: the said engineer was running said engine and train of cars at a dangerous and reckless rate of speed, so that some of the cars were derailed, and plaintiff was thrown from the top of a car and damaged as aforesaid. (6) And plaintiff avers that his injuries were caused by a defect in the track then and there used by the defendant, which defect consisted in this, to wit, the rails of the track were old and worn, the cross-ties rotten, rails insecurely fastened on the cross-ties; the track was insufficiently ballasted, so that on account of said defect some of the cars were derailed, and plaintiff was thrown from the top of a car and suffered damages as aforesaid. And plaintiff avers that said defect arose from, or had not been discovered or remedied owing to, the defendant's negligence, or the negligence of some person in

*See *Gulf, etc., Ry. Co. v. Moore* (Tex.), 3 R. R. R. 620, 26 Am. & Eng. R. Cas., N. S., 620 (engineer's right to rely on assumption that track was in reasonably safe condition); *Smith v. Erie R. Co.* (N. J.), 4 R. R. R. 793, 27 Am. & Eng. R. Cas., N. S., 793 (risk from failure to repair roadbed not assumed); note, 11 Am. & Eng. R. Cas., N. S., 863; *Chicago G. W. Ry. Co. v. Price* (C. C. A.), 16 Am. & Eng. R. Cas., N. S., 324 (conductor does not assume risk from defective roadbed); *Wilkie v. Raleigh & C. F. R. Co.* (N. Car.), 19 Am. & Eng. R. Cas., N. S., 295.

the service of the defendant, and intrusted by the defendant with the duty of seeing that said track was in proper condition; the name of said person being unknown to the plaintiff." "(8) And plaintiff avers that his injuries were caused by the negligence of one ——— Gould, whose given name is unknown to plaintiff, and who was an engineer, and who then and there had charge of the locomotive which was pulling the train of cars upon which plaintiff was engaged as brakeman, and said negligence consisted in this: the said engineer so negligently and carelessly managed his engine as to throw some of the cars which were being drawn by said engine from the track, whereby the plaintiff was thrown from the top of a car and injured and damaged as aforesaid." Defendant demurred to the fifth count on the grounds that: "(1) No facts are alleged showing that said alleged rate of speed was negligent, reckless, or dangerous. (2) The rate of speed is not alleged. (3) It is not shown or alleged how, or in what way, or by reason of what facts or circumstances said rate of speed was negligent, dangerous, or reckless." Defendant demurred to the sixth count on the grounds that: "(1) It is not shown thereby whether said alleged defect was due to the negligence of defendant or to the negligence of some particular employee of defendant. (2) It is not shown thereby what was the official position of said person intrusted by defendant with the duty of seeing that its track was in proper condition." Defendant demurred to the eighth count for the same reasons as are assigned to the fifth count, and also upon the following grounds: "(4) The facts constituting said alleged negligence are not stated with sufficient particularity. (5) It is not shown in what respect or in what way said engineer was negligent. (6) It is not shown that said engineer's name could not be ascertained by plaintiff by the use of reasonable diligence." The court overruled each of the foregoing demurrers, to which ruling the defendant excepted, and assigns same as error. Issue was joined on pleas of general issue and contributory negligence; in short, by consent. The testimony for the plaintiff showed that the train was running, at the time of the accident, from 15 to 20 miles per hour, that the grade was very steep, and that in the condition of the track 8 to 10 miles per hour would be a safe rate of speed. The section foreman, a section hand, a brakeman on the wrecked train, and the plaintiff testified that the rails were badly worn, that the ties were rotten, and that the track needed ballasting. The section foreman testified that he had noticed the bad condition of the track several months before; that he endeavored to repair same with such material as was at his disposal, but that there was not sufficient material to repair same properly. The plaintiff asked this witness whether he would consider, from his experience as a railroad man, that the track was a safe one; to which witness replied

that he would not call it a safe track. To this question and the answer thereto defendant objected on the ground that it was merely the conclusion of the witness. The court overruled these objections, and defendant excepted. Plaintiff's counsel asked plaintiff "whether or not the rate of speed of 18 or 20 miles an hour at that point, with the train loaded as it was, was a dangerous rate of speed for the train to make," to which plaintiff replied that the train was going at a dangerous rate of speed. He was also asked by counsel, "Would fifteen miles an hour or twelve miles an hour have been a dangerous rate of speed at that time and place, loaded as the cars were?" to which plaintiff replied that it would. To these questions and the answers thereto defendant objected. The court overruled the objections, to which defendant excepted. The testimony for the defendant tended to show that the track was in fairly good condition, and the speed of train 8 to 10 miles an hour. The defendant requested the affirmative charge as to the whole complaint and each count thereof, and also the following special charges: "(21) If the jury believe from the evidence that the defects or defective condition of the track, if any existed at the time plaintiff became a brakeman for defendant, it was his duty to inform himself of them, and if he failed to do so he assumed the risks thereof." "(26) If you believe from the evidence that plaintiff is entitled to recover, you cannot award any damages on account of mental or physical suffering he has sustained since the injury." The court refused to give above charges, to which defendant separately excepted. There were verdict and judgment for plaintiff assessing his damages at \$1,999. Defendant filed a motion for a new trial on the grounds that the verdict was excessive; the amount of same was not justified by the evidence as to the damages sustained; that it was not shown that plaintiff's injury was permanent; because, under the allegations of the complaint, plaintiff was not entitled to recover damages for mental and physical pain and suffering after the day of the injury and up to the time of the trial; because the verdict was contrary to the great weight of the evidence in this: that the weight of the evidence did not show that the injury was caused by the defective condition of the track or by the negligence of the engineer. Said motion was denied, and defendant duly excepted.

Humes, Sheffey & Speake, for appellant.

A. H. Carmichael, for appellee.

McCLELLAN, C. J. We read the fifth count to aver that the train of cars upon which plaintiff was in discharge of his duties as a brakeman was derailed, and plaintiff thereby injured, in consequence of its being run by the engineer in charge at a rate of speed which was reckless; that is, negligent, and unregardful of consequences, and dangerous. This is a sufficient averment of negligence under the decisions of

this court. It is much the same as an averment that the engineer so negligently run his engine as to cause the derailment, and injury to plaintiff. *Louisville & Nashville Railroad Company v. York, Admr.*, 128 Ala. 305, 309, 30 South. 676.

The averment of the sixth count that the defect in defendant's track which caused the injury "arose from, or had not been discovered or remedied owing to, the defendant's negligence, or the negligence of some person in the service of the defendant, and intrusted by the defendant with the duty of seeing that said track was in proper condition," etc., is a necessary averment under the statute, is well made substantially in the language of the statute, and is sufficient, as has been expressly held, without averring the name of the person so intrusted. Whether the defect arose from defendant's personal negligence or of a person "intrusted" in that behalf, and, if the latter, his name, are facts best known, in the nature of things, to the defendant; and the averment as here made is not only sufficient in all cases, but in many it is the only averment that can be made. *Columbus & Western Ry. Co. v. Bradford*, 86 Ala. 574, 579, 580, 6 South. 90; *Woodward Iron Co. v. Herndon, Adm'r*, 114 Ala. 191, 215, 21 South. 430.

The eighth count was not open to the objections taken by the demurrer. It sufficiently charges damnifying negligence on the part of the defendant's engineer in the management of his engine (*Railroad Co. v. York, supra*), and it in effect avers the surname of the engineer, and that his Christian name is unknown to plaintiff. It was not necessary for plaintiff to aver that he had made diligent effort to ascertain the engineer's full name, but had failed to ascertain it.

The witness Stewart was shown to be skilled and experienced in respect of track construction and track conditions. He was competent to give the opinions elicited from him to the effect that the track at the point of the derailment was in a defective and unsafe condition.

So with the witness Shea, in respect of the speed of the train at the moment of derailment. He had had long experience as a brakeman. His duties had to do with the regulation of the speed of the train under the varying circumstances of curve, grade, and the like, incident to a line of railway. He knew what was understood to be a safe rate of speed down the grade and around the curve at the point of this derailment. His experience especially qualified him to judge the speed of this train at that point. He was entitled as an expert to give his opinion on each of these matters, and to further state it as his opinion that the train, at the time and place in question, was running at a dangerously high speed; or, in other words, that the rate at which he said it was going—about 20 miles an hour—was a dangerous rate of speed.

Each count of the complaint was supported by tendencies of the evidence, which made a case under each for the determination of the jury; and these tendencies were sufficiently strong in support of one or more of the counts as to render it impossible for us to affirm that the circuit court erred in overruling defendant's motion for a new trial in so far as that motion was rested on the ground that the verdict was contrary to or not sustained by the evidence. Nor can we affirm that the court erred in its conclusion that the verdict was not excessive in amount. Hence our conclusion that the court properly refused to give the affirmative charge requested by the defendant upon the whole case and upon each count, and that the court did not err in overruling the motion for a new trial.

The case made by the evidence under the sixth count is essentially different from that of *Davis v. Miller*, 109 Ala. 589, 19 South. 699. There the overwhelming weight of evidence showed that the cause of the derailment was the presence of Miller's body under the cars, and not any defect in the track. Indeed, the evidence greatly preponderated to show that there was no defect. Here there is abundant evidence of a flagrantly defective condition of the track at the point of the derailment. But it is said that the evidence shows that these defects did not cause the derailment, for that it appeared, beyond dispute that a wheel of one of the cars mounted a rail short of the point where the cars left the track and smashed it all to pieces, and that the defects shown in the evidence—rotten cross-ties all along there, old, worn and inadequate rails, etc.—could not have possibly caused the wheel to mount the rail, but tended only to cause the rails to spread away from each other, the effect of which would have been obviously to let the wheels down on the ties between the rails, etc. The fault of this position lies in its assumption that the mounting of a rail by a wheel of one of the cars was the beginning of the trouble and the cause of the derailment. This does not necessarily follow at all. Non constat, but this was itself caused by the derailment of cars in front of this one, or front wheels of this car. There was ample reason on the evidence for the jury to so find—to conclude that other cars in front of this, or wheels in front of this, left the track in consequence of its defective condition, and caused this wheel to mount the rail; that, in other words, this mounting of the rail was a consequence, and not the cause, of the derailment. Indeed, that is the most reasonable conclusion open to the jury on the evidence. The fact that other trains passed safely over this track a short time before this occurrence did not preclude such finding by the jury. It may well be that these very preceding trains so aggravated the defective condition of the track as to render it incapable of bearing the weight and motion of the cars which

were thrown off. Nor does the fact that the engine of **this** train, heavier than the cars, passed safely on this occasion, demonstrate that the cars were not derailed in consequence of a defective track. It may well be that cars in a train, especially on a defective track, running down a steep grade around a curve, would have imparted to them a swaying, lateral, jerky motion, more likely to spread a track or break light rails attached to insecure rotten ties than would be the more regular and direct motion of the heavier engine.

One averment of the sixth count descriptive of the alleged defective condition of the track is that the rails were "insecurely fastened to the cross-ties." It is insisted for appellant that there is no proof of this averment. We cannot concur in this view. The evidence was overwhelming that the ties were rotten. The jurors' common knowledge was sufficient to afford them necessary assurance that rotten wood will not hold a nail or spike, and to justify their finding that the rails were not securely spiked to this rotten wood.

There was evidence by the engineer himself that the proper speed coming down this grade and around this curve was 8 or 10 miles an hour. There was other evidence that he brought his train down there on this occasion at a speed of from 15 to 20 miles an hour, and that this was an improper and dangerous speed. This was clearly sufficient to justify a finding on the part of the jury that he was guilty of negligence in the management and running of his engine.

On the question of plaintiff's alleged contributory negligence, the utmost that can be said is that there was some evidence tending to show that he was not duly diligent in putting on the brakes of which he had charge as the train ran down this grade, leaving it an issue for the jury under the fifth and eighth counts whether he was negligent in that respect, and, if so, whether such negligence contributed to his injury. Trainmen do not assume the risks of defective track conditions. They have a right to assume that the track is safe. It is not their duty, but the duty of other employees, to keep it in proper condition. The acquaintance which trainmen are required to have with the premises, and to acquire which they are carried over the road on trains before being put in charge of trains, is more an acquaintance with the line, so to say, than with the track. They must know, and in the way indicated they are taught, the conditions of the line in respect of stations, stopping places, switches, sidings, grades, curves, and distances. With these things they have to do; but not with the track itself in respect of its condition and maintenance. This plaintiff, a brakeman, was not charged with knowledge of the defects in this track, but, to the contrary, had a right to assume without investigation that the track was in good and safe condition. Charge 21 was

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therefore properly refused. Ga. Pac. Ry. Co. v. Davis, 92 Ala. 300, 308, 309, 9 South. 252, 25 Am. St. Rep. 47; K. C. M. & B. R. R. Co. v. Webb, 97 Ala. 157, 11 South. 888.

Charge 26 was also properly refused. We follow the example of appellant's counsel in pretermittting discussion of it. Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

MURPHY v. GRAND TRUNK RY. CO.

(Supreme Court of New Hampshire, Coos, July 19, 1904.)

[58 Atl. Rep. 835.]

Injury to Conductor—Knowledge of Defects—Assumption of Risks.*

Plaintiff, the conductor of a freight train, was injured while assisting in reassembling it after it had broken into four sections while in transit, by reason of a defective automatic coupler attached to one of the cars, of which plaintiff had no knowledge until the train had broken in two. Though it was no part of plaintiff's duty to assist in reassembling the train after he had found out the trouble and its cause, he endeavored so to assist, and was injured while endeavoring to detach a chain which had been used in moving one of the cars, by the brakeman's failure to ascertain where plaintiff was before giving a signal to the engineer to start his engine, by the engineer's failure to ring the bell before he started, or by plaintiff's failure to give the engineer a stop signal before going between the cars: *held* that, in the absence of evidence that plaintiff did not know of and fully appreciate the danger that would naturally result from the happening of any one or all of such acts, he assumed the risk thereof.

Same—Same—Same.

Where plaintiff, the conductor of a freight train, was injured while attempting to reassemble it after it had broken into parts by reason of a defective coupler, and the rules of the company made it plaintiff's duty when there was an accident to find out what caused it, in the absence of evidence that if plaintiff had used ordinary care in examining the couplers he would not have discovered the defect, he would be presumed to have known that the coupler was defective at the time he ordered the brakeman to use it.

Transferred from Superior Court; Stone, Judge.

Action by Charles J. Murphy against the Grand Trunk Railway Company for injuries. At the close of plaintiff's evidence, defendant moved for nonsuit, which was denied, and, after verdict in favor of plaintiff, the case was transferred to the Supreme Court for a hearing on defendant's exception to the denial of such motion. Exception sustained.

The plaintiff's evidence tended to prove the following facts: At the time of his injury, the plaintiff had been employed by the defendant for about seven years, and had served as conductor for three and a half years. On October 30, 1901, his run was from Portland, Me., to Island Pond, Vt. He started from Portland with a freight train of 60 cars at

*See extensive note appended to *Hewitt v. East Jordan Lumber Co.* (Mich.), 13 R. R. R. 212, 36 Am. & Eng. R. Cas., N. S., 212.

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about half past 5 in the morning. He had nothing to do with making up the train. A knuckle (a part of an automatic coupler) on the sixth car from the rear of the train was so defective that the train separated when about four miles from Portland, and near Falmouth; the immediate effect of the separation being to set the brakes on nearly every car. This caused two other couplings to separate, breaking the train into four sections. The first section consisted of one car, the second and third sections of from 20 to 30 cars each, and the rear section of 5 cars and the caboose. Such accidents are not uncommon, and when one happens it is the duty of the conductor to first send out flagmen, and then to learn the cause of the accident, and remedy it, if possible. In doing this work, the whole train crew act under the conductor's orders. When the wreck occurred, the plaintiff sent the rear brakeman back to flag trains, and then walked to the locomotive, and directed the engineer to put the forward car on the Falmouth siding. While this was being done, he fastened the second and third sections together with a chain, and directed the engineer to draw them upon the "passing track" at Falmouth. An attempt to execute this order having failed, the engineer drew the second section upon the passing track, and then backed the locomotive down, and chained it to the third section. At this juncture another train arrived, and the plaintiff decided to have the locomotive which drew the latter push the third and fourth sections of his train upon the passing track. In the execution of this design, he walked back to the rear of his train, and gave the necessary orders to the rear brakeman, who signaled to the engineer, and the latter coupled his locomotive to the fourth section. The plaintiff and brakeman then mounted the car where the first break occurred, but not that equipped with the defective coupler, and the section was pushed up to where the third stood. The plaintiff then directed the brakeman to couple the two sections, and started toward the head of the train, to disconnect the locomotive. About the time he reached his destination, the two sections came together. The plaintiff thought the coupling was made, but he did not stop to see whether it was or not, nor did he give the engineer the "stop" signal, usually given when work is to be done between cars, but stepped in between the locomotive and the car to which it was attached, for the purpose of taking off the chain. The coupling had not been made, and when the brakeman learned this he gave the engineer the signal to "slack back." The brakeman looked at the coupler on the end of the third section, found it defective, fixed it, and gave the engineer the signal to come ahead. At this attempt the coupling was made. When the cars came together the shock moved the whole of the third section ahead, caught the plaintiff between the forward car and the locomotive, and caused the injuries complained of. At the

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time of giving the last signal, the brakeman thought he saw the plaintiff standing beside the track near the locomotive; but the person he in fact saw was the head brakeman. The plaintiff knew that automatic couplers sometimes fail to unite on the first impact, and that if a stop signal was given to the engineer he would not start until he was signaled to do so.

Daniel J. Daley, Herbert I. Goss, and Drew, Jordan, Buckley & Shurtleff, for plaintiff.

Clarence A. Hight, Leroy L. Hight, and Chamberlin & Rich, for defendant.

YOUNG, J. The only ground on which the plaintiff claims to recover is the defendant's failure to furnish him with suitable instrumentalities with which to do his work; so the only questions raised by the defendant's motion are whether there was any evidence from which it could be found (1) that the defendant's failure to equip this car with a suitable coupler was the legal cause of his injuries; (2) that the danger from using this coupler in the condition it was in at the time of the accident was not a risk he assumed; and (3) that he was free from fault at that time. Only one of these questions will be considered, for although whether the plaintiff was free from fault, and whether the cause of a dangerous situation is the legal cause of an accident that results from that situation, are both questions of fact (*Ela v. Cable Co.*, 71 N. H. 1, 51 Atl. 281; *Aldrich v. Railroad*, 67 N. H. 380, 36 Atl. 252; *Nashua Iron & Steel Co. v. Railroad*, 62 N. H. 159, 164), it will not be necessary to consider them; for, if it is conceded that the defective coupler was a contributing cause, and not merely the occasion, of the accident, and that he was free from fault, he cannot recover because it conclusively appears that the danger from using the coupler in the condition it was in at the time of the accident was a risk he assumed.

It is the general rule that every one who voluntarily takes a particular position assumes the risk of all the dangers incident to remaining there of which he either knows or would know if he used ordinary care. *Miner v. Railroad*, 153 Mass. 398, 26 N. E. 994. By this is only intended that he assumes the risk of all the dangers of the situation that are apparent to his observation; for he does not assume a risk when for any reason he could not be expected to apprehend it. *Demars v. Company*, 67 N. H. 404, 406, 40 Atl. 902. So the test to decide whether a person assumes the risk of a particular danger, when it appears that he in fact did not know of it, is to inquire whether or not an ordinary man would have known of it.

The reason why every one who voluntarily enters into any situation is held to assume the risk of all dangers he knows are incident to remaining there is obvious. When a person

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invites others to come upon his premises, either to work, to play, to trade, or to do any of the numerous things which are included in the ordinary affairs of life, the law imposes on him the duty of doing what the ordinary man would do under similar circumstances, or, in other words, the duty of using ordinary care, to protect his guests from injury; and it also imposes on his guests, for his benefit, the duty of using the same care to avoid being injured. He may perform his duty in this respect in either of two ways: he may keep his premises in such condition that they are suitable for the purposes for which he is using them, or he may notify his guests of the dangers incident to coming upon or remaining on unsuitable premises. No one is required to do a useless thing, so he is not required to notify his guests of dangers incident to remaining on his premises with which they are already familiar. It follows that he owes his guests no duty whatever in respect to the dangers incident to coming upon his premises of which they know, or would have known if they had used ordinary care; for the law charges them, not only with all the knowledge they have in respect to the dangers of the situation, but also with all the knowledge they would have had if they had used such care. *Shea v. Railroad*, 69 N. H. 361, 41 Atl. 774. The relation of master and servant is a voluntary undertaking; so the law imposes on the servant the risk of all the dangers of the employment of which he either knows or would have known if he had used ordinary care. This includes the risk of the dangers which arise from the use of defective instrumentalities and from the negligence of fellow servants. *Galvin v. Pierce*, 72 N. H. 79, 54 Atl. 1014; *Hill v. Railroad*, 72 N. H. 518, 57 Atl. 924; *O'Hare v. Company*, 71 N. H. 104, 51 Atl. 257, 93 Am. St. Rep. 499; *McLaine v. Company*, 71 N. H. 294, 52 Atl. 545, 58 L. R. A. 462, 93 Am. St. Rep. 522; *Fifield v. Railroad*, 42 N. H. 225, 240.

Although a servant does not assume the risk of a danger of which he did not learn until so soon before he was injured that after learning of it he could not have left the service in safety (*Olney v. Railroad*, 71 N. H. 427, 52 Atl. 1097), it is entirely immaterial when he learned of the danger if after he knew of it he could have left the service. If he remains after he knows of it, the law imposes on him the risk incident to remaining. *Henderson v. Williams*, 66 N. H. 405, 23 Atl. 365. Neither is it material how the dangerous situation was created; for if a servant continues with the master after he knows of the danger, the law imposes on him the risk incident to remaining, whether the dangerous situation arose from natural causes, or was created by the master's negligence. *Leazotte v. Railroad*, 70 N. H. 5, 45 Atl. 1084.

The breaking apart of the train caused the plaintiff no injury. After the several sections came to rest, he stepped to the ground unharmed. The original dangerous situation

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created by the defendant's negligence—the operation of a train containing cars connected by a defective coupler—was ended. Assuming that the separated train also constituted a dangerous situation due to the defendant's negligence, the plaintiff ran no risk unless he elected to engage in the work of reassembling the train. If the danger was due to the defendant's failure to comply with the obligations of its contract, the plaintiff, having performed his duty of protecting his train under the rules, would be under no obligation to engage in the work of correcting the results of its negligence, unless his contract of employment required him to reassemble the train regardless of the cause of its breaking apart. He would have both a legal reason and a physical opportunity to refuse the service. Whether or not it was his duty, as a conductor, to endeavor to reassemble the train, broken apart because of the defendant's negligence, is immaterial. If he remained because he was willing to waive the defendant's breach of contract, or if it was because his contract required him to remain under the circumstances, the result would be the same. In either event the law would impose on him the risk of all the dangers incident to assembling his train in the condition the cars were in at that time, of which he either knew or would have known if he had used ordinary care. So the only question which it is necessary to consider, to determine whether he assumed the risk, is whether or not he knew of the danger which was the immediate cause of his injury. The evidence shows that the direct causes of his injury were the brakeman's failure to find out where the plaintiff was before he gave the engineer the signal to start his engine, the engineer's failure to ring the bell before he started, and the plaintiff's failure to give the engineer a stop signal; for, notwithstanding the defective coupler, no accident would have happened if he had given the engineer a stop signal before he stepped between the cars, or if the engineer had rung his bell before he started his engine, or if the brakeman had found out where the plaintiff was before he gave the engineer the signal to go ahead. All these concurred, both in point of time and causation, to produce the injury, and there is no evidence from which it could be found that the plaintiff did not know of and fully appreciate the danger that would naturally result from the happening of any one or all of them; so it must be held that the causes of his injury were the risks he assumed.

Conceding that the defective coupler was a contributing cause, and not merely the occasion, of the accident, there is no force in the plaintiff's contention that, because he did not have actual knowledge of the particular defect which caused the coupler to separate and wreck the train, he did not assume the risk incident to using the coupler in the condition it was in when the accident happened; for when it is a person's duty to know anything, the law will charge him, not only

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with all the knowledge he has in respect to the matter, but also with all he would have had if he had used ordinary care. *Davis v. Railroad*, 70 N. H. 519, 49 Atl. 108. The rules made it the plaintiff's duty, when there was an accident, to find out what caused it. So it was his duty to examine the couplers which had parted before he used them, and there is no evidence from which it could be found that if he had used ordinary care in examining them he would not have discovered the defect; so he must be held to have known that the coupler was defective when he ordered the brakeman to use it.

Exception sustained. Verdict set aside. All concurred.

RICHEY *v.* SOUTHERN RY. CO. et al.

(Supreme Court of South Carolina, June 24, 1904.)

[48 S. E. Rep. 285.]

Injury to Engineer—Negligence—Pleading—Admissibility of Evidence.

In an action by an engineer against a railroad company for personal injuries, where the plaintiff alleged negligence on the part of the conductor, and also on the part of the railroad company, he could recover on proof of the negligence of servants other than the conductor.

Same—Failure to Provide Safe Track—Nonassignable Duties.*

Where an engine was derailed by the failure of a brakeman to properly set a switch, and the engineer was injured, the accident resulted from the failure of the master to provide a safe track, the responsibility for which could not be assigned by the master to the servant. By divided court.

Same—Duty To Keep Roadbed and Appliances in Safe Condition.†

An instruction that it is the duty of a railroad company to keep its roadbed and appliances in proper and safe condition for the safety of its employees is proper.

Instructions.

An instruction based on a principle of law not applicable to the pleadings is properly refused.

Woods and Jones, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Abbeville County; Dantgler, Judge.

Action by R. A. Richey against the Southern Railway Company, the Columbia & Greenville Railway Company, and Les Moore. From a judgment for plaintiff, defendants appeal. Affirmed.

*As to what are the duties of a railroad company which it cannot delegate, so as to escape liability for injuries to its employees under the fellow servant doctrine, see foot-note appended to *McLean v. Pere Marquette R. Co.* (Mich.), 13 R. R. R. 544, 36 Am. & Eng. R. Cas., N. S., 544.

†As to the liabilities of railroad companies for injuries to their employees from unsafe tracks and roadbeds, see foot-note appended to *Birmingham Traction Co. v. Reville* (Ala.), 9 R. R. R. 524, 32 Am. & Eng. R. Cas., N. S., 524, where all the preceding authorities in this series are collected; *McLean v. Pere Marquette R. Co.* (Mich.), 13 R. R. R. 544, 36 Am. & Eng. R. Cas., N. S., 544.

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T. P. Cothran, for appellants.

Wm. N. Graydon, for respondent.

GARY, A. J. This is an action for damages on account of injuries sustained through the alleged negligence of the defendants. The jury rendered a verdict against the defendants for \$12,500.

As some of the questions presented by the exceptions arise under the pleadings, it is deemed advisable to set out certain parts of them. The first, second, and third paragraphs of the complaint contain merely formal allegations, and the fourth paragraph alleges that the defendant Les Moore was a conductor in charge of the train of cars at the time hereinafter mentioned. The other allegations thereof are as follows:

"(5) That on the 20th day of March, 1902, plaintiff was, and had been for several years, an engineer in the employment of the defendant Southern Railway Company, and on the 20th day of March, 1902, was engaged in running an engine on the Columbia & Greenville Railroad, and the conductor in charge of said train was the defendant Les Moore.

"(6) That the train run by the plaintiff was a freight train, and plaintiff was ordered by the conductor, Les Moore, to put some cars of coal on the coal-chute tracks, so that they could be unloaded into the coal bins, which coal chute was situated at Hodges, a station in Greenwood county, between Columbia and Greenville, on the Columbia & Greenville Railroad.

"(7) That, in order to get to the point where the said cars were to be placed, plaintiff had to run his engine and the car of coal he was ordered to place out on a side track or spur track leading up to said coal chute, and said side track or spur track was up a steep grade, and was known to the defendants to be dangerous to go up and down.

"(8) That on said 20th day of March, 1902, at about half past 8 o'clock p. m., the said defendant Southern Railway Company and its conductor, Les Moore, carelessly and negligently, wrongfully, and unlawfully caused the 'monkey switch' to be unsecurely and improperly fastened, and left open and uncared for, in consequence of which said engine and tender coming down said side track or spur track from said coal chute or bins, by the negligence and carelessness of the defendants, as above stated, was derailed and turned over, and this plaintiff was permanently and seriously injured in his spine, and has been incapable of doing any work since, has suffered excruciating pains and has had to spend a large amount for drugs and medical attention, all to his damage in the sum of \$25,000.

"(9) That it was the special duty of the defendant Les Moore, who was conductor on said train, to have been with said train and looked after said track, and seen that it was in proper condition; but said conductor, in violation of his duty, and unmindful of the obligation resting on him, care-

lessly, negligently, wrongfully, and unlawfully left said train, and failed to go to the coal chute, but stayed at the depot a distance of six or eight hundred yards from said coal chute, and was there when said engine was derailed, and thus contributed to said wrong and injury, to the damage of the plaintiff \$25,000.

"(10) That plaintiff was an experienced engineer, and was making at the time he was injured from \$125 to \$130 per month, but, owing to the careless, negligent, wrongful, and unlawful conduct of the defendant, hereinabove set forth, the plaintiff has been seriously and permanently injured," etc.

The defendants denied the material allegations of the complaint, and alleged that the injury was caused by the plaintiff's negligence.

In considering the questions raised by the exceptions, we will follow the arrangement adopted by the appellant's attorney in his argument. We will first dispose of those numbered 1 and 2, which are as follows: "(1) Under the allegations of the complaint should the plaintiff have been allowed to recover upon proof of the negligence of any other servant of the company than Moore, the conductor? (2) If not, is there any evidence tending to show negligence on the part of Moore, the conductor?" By reference to paragraphs 8 and 9 of the complaint, it will be seen that plaintiff not only alleges negligence on the part of Les Moore, the conductor, but likewise on the part of the Southern Railway Company. This disposes of both the said questions.

The third question argued by the appellants' attorney is as follows: "(3) If the plaintiff could rely upon the negligence of Latimer, the brakeman, was Latimer's failure to set the switch the act of a fellow servant, or a breach of one of the master's nonassignable duties?" In the case of *Coleman v. R. R.*, 25 S. C. 446, 60 Am. Rep. 516, it appeared that Coleman was a laborer on a material train of which Griffin was the conductor; that, after their day's work, the train was run to the station at Eastover, and, arriving there a little after sundown, the conductor, Griffin, had the switch turned so as to connect with a side track at that place, and ran the train on said side track in order to spend the night. The laborers remained in the shanty of the material train. About two hours thereafter, the regular passenger train, in passing, ran on the side track, and into collision with the material train, by which one man was killed and the plaintiff was injured. The negligence alleged was in allowing the switch to remain in connection with the turn-out, instead of the main line. In that case the court uses this language: "In the view that Griffin, the conductor, may have left the switch open after using it, the argument was made that, although clear negligence on his part, it was the negligence of a fellow servant, for which the company is not responsible to the plaintiff; that, in reference to the special

duty of the conductor to restore the switch to its place in connection with the main line, he was not a 'middleman,' representing the company, but a mere 'switchman,' doing the duty of 'a mere operative.' We do not see clearly the distinction suggested. Taking the rule to be as stated by Mr. Wood in his work on Master & Servant, § 438, it seems to us that the adjustment of the switches was an important duty resting on the company no matter to whom the performance of that duty was delegated. Mr. Wood says: 'To formulate a rule from these cases, it would be as follows: Whenever the master delegates to another the performance of a duty to his servants, which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and, to the extent of the discharge of those duties by the middleman, he stands in the place of the master, but as to all other matters he is a mere co-servant.' In the late case of *Calvo v. Railroad Company*, 23 S. C. 528 [55 Am. Rep. 28], this court held that a locomotive engineer and a section master of track workers are not fellow servants, in the sense that the railroad company employing them would not be liable to one for damages resulting to him from the negligence of the other." The court then quotes with approval the following language from the case of *Calvo v. R. R. Co.*, to wit: "Now, it is well settled that it is the duty of the master not only to provide his servants, in the first instance, with suitable and safe machinery and other appliances to do the work for which they are employed, but also to keep the same in proper repair; and any negligence in the performance of such duty, whether done by the master in person, or by subordinate agents selected by him for the purpose, would render the master liable for any injury sustained by one of his servants by reason of such negligence. The question is as to the nature of the duty, not as to the rank or grade of the person employed to perform it. Is it a duty which the master owes to his servants? Under the well-settled rule above mentioned, we think that nothing can be clearer than that it is the duty of a railroad company to provide a suitable and safe track over which its locomotive engineers and other servants of that class are required to run its trains, and that negligence on the part of those to whom it commits such duty is the negligence of the company." Proceeding in the *Coleman Case*, just mentioned, the court says: "If it is the duty of the company to provide a suitable and safe track, of which there is no doubt whatever, it is most assuredly no less its duty to keep in order and rightly placed the switches, which are certainly important parts of the track, and probably needing more strict attention than any other. We do not think that the conductor, Griffin, in respect to the special duty of readjusting the switch, was a fellow servant of the plaintiff,

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in the sense of the rule relied on. See *Couch v. C., C. & A. R. R. Co.*, 22 S. C. 557." Also, *Reed v. R. R.*, 37 S. C. 42, 16 S. E. 289; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262, 44 Am. Rep. 573; *Lasure v. Graniteville Mfg. Co.*, 18 S. C. 282.

Upon the request of the appellants' attorney, permission was granted to review the case of *Coleman v. R. R.*, 25 S. C. 446, 60 Am. Rep. 516. The authorities upon the question of fellow servants are numerous and conflicting. The difficulty arise in application of general and well-settled principles to the particular case under consideration. In transporting passengers and freight, a railroad company is necessarily compelled to utilize and employ many agencies. The great object in view is the operation of its trains of cars. The law imposes certain duties upon the master, which public policy demands shall not be delegated by him to others; and, even when he attempts to assign them to others, he is still liable for the negligence of those discharging these nonassignable duties. One of the duties which the law imposed upon the master in this case was to provide a safe and suitable track at the time the plaintiff, as engineer, operated the train of cars upon it. It is not a sufficient excuse for the master to say that, although the track was unsafe, nevertheless it had furnished one of its employees with suitable and proper machinery for making it safe at the time of the accident. If this could be successfully contended, it would enable the master to avoid responsibility for failing to provide a safe place for its employees to perform their work. This case is very different from that of *Jenkins v. R. R. Co.*, 39 S. C. 507, 18 S. E. 182, 39 Am. St. Rep. 750. The principles decided in that case are correctly set forth in the syllabus as follows: "The conductor of a preceding freight train and the assistant fireman of a following freight train are fellow servants, to the extent that the fireman on train No. 2 cannot recover from the master for damages received by him in jumping from his engine to avoid a collision with cars on the track detached from train No. 1, of whose presence proper signals by torpedoes or otherwise had not been given. Whether persons in the same employment are fellow servants does not depend upon the respective rank, grade, or authority of the servants. It is the duty of the railroad company, as master, to furnish a safe track and competent servants; but this duty is not violated where the track, safe in itself, is rendered dangerous for the time by the omission of one of its servants to give the necessary notice of the obstruction thereon to a fellow servant on an approaching train." In that case the servant whose negligence caused the injury was not attempting to exercise one of the primary duties of the master, and the obstruction of the track was merely incidental to the operation of the trains of cars running upon it, while in the case under consideration the track in itself was unsafe for

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the operation of trains of cars at the time of the injury. The Supreme Court surely could not have intended to infringe upon the doctrine announced in *Coleman v. R. R.*, supra, when it decided the case of *Jenkins v. R. R.*, as both opinions were written by the same member of the court, and in the *Jenkins* Case no reference is made to the *Coleman* Case. We think the doctrine announced in the case of *Coleman v. R. R.* should be affirmed.

The fourth question argued by the appellant's attorney is: "Did the circuit judge err in imposing the absolute duty upon the railway company to provide the plaintiff with safe appliances and a safe place in which to work?" His honor the presiding judge charged the jury that it was the duty of the defendant Southern Railway Company to keep its roadbed and appliances in proper and safe condition. The assignment of error is that the presiding judge should have charged that it was the duty of the defendant company only to exercise ordinary care in keeping the roadbed and appliances in proper and safe condition, and to keep its switches locked and in proper condition. The charge of the circuit judge in this respect was in conformity with the doctrine announced by the text-writers, and with the decision hereinbefore mentioned. The facts set forth in the assignment of error constitute matter of defense, but are not elements in the cause of action. *Branch v. R. R. Co.*, 35 S. C. 405, 14 S. E. 808.

The fifth and last question is: "Did the circuit judge err in refusing to charge the defendants' fourth request?" That request was as follows: "If the plaintiff's injuries were caused by his own disobedience of the rules of the company, or if such disobedience contributed thereto as a proximate cause, the defendants are not liable." The assignment of error is that the request embodied a correct proposition of law applicable to the case. The request was properly refused because it was not responsive to any issue made by the pleadings.

It is the judgment of this court that the judgment of the circuit court be affirmed.

POPE, C. J., concurs. WOODS, J., dissents, and concurs with JONES, J.

CHICAGO, I. & L. RY. CO. v. BARNES.

(Supreme Court of Indiana, Jan. 25, 1905.)

[73 N. E. Rep. 91.]

Employers' Liability Act—Application—Pleading.

A complainant who seeks to base an action on any of the provisions of the employers' liability act (Burns' Ann. St. 1901, § 7083) must, by positive and direct averment of facts, show that the action falls within the particular provision on which he relies.

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Death of Employee—Duty of Master—Pleading.

In an action against a master for the death of an employee, the complaint need not allege that a certain act or line of conduct was a duty imposed on the defendant by law.

Negligence—Pleading.

In an action for negligence, where a legal duty and a violation thereof are disclosed by the complaint, a general averment of negligence is sufficient on demurrer.

Death of Switchman—Location of Switch Tracks—Ignorance of Deceased—Sufficiency of Complaint.*

In an action against a railroad for the death of a switchman in its employ, alleged to have been caused by the negligence of the defendant in constructing its switchyard tracks in too close proximity to each other, a complaint which fails to show that prior to the accident the deceased was ignorant of the alleged condition of the tracks is demurrable.

Petition for rehearing granted. Original opinion set aside, and judgment reversed.

For former opinion, see 68 N. E. 166.

PER CURIAM. Action by appellee against appellant for the negligent killing of her decedent. The complaint contains two paragraphs. Trial by jury, and a general verdict awarding damages for the sum of \$2,500, together with answers to numerous interrogatories returned. Over motions by appellant for judgment on the answers to the interrogatories and for a new trial, judgment was rendered on the general verdict. The errors assigned relate to the overruling of the demurrer to each paragraph of the complaint, and to the overruling of each of the above-mentioned motions.

The first paragraph of the complaint may be said to disclose substantially the following facts: Appellee is the administratrix of George E. Coombs, deceased, and appellant is a railroad corporation duly organized, operating, and controlling a railroad running through the state of Indiana, which, among others, runs through the counties of Montgomery and Monroe. On and prior to the 2d day of December, 1899, Coombs, the decedent, was in the employ of appellant as a brakeman; serving as such on one of its freight trains which ran over its said railway. Immediately beyond the corporate limits of the city of Bloomington, in Monroe county, Ind., appellant on and previous to the afore-said date had a switchyard, wherein it negligently constructed and maintained, as alleged, several switch tracks or sidings, and also a roundhouse and telegraph station. These side tracks or switches were about one-fourth to one half mile in length, and parallel with the main railroad track. The distance between these switch tracks was from 6½ to 7 feet, and freight cars running thereover would, it is alleged, protrude and extend over and beyond the track or tracks to a

*For the general principles involved in the doctrine of assumption of risks by railroad employees, see foot-note appended to Illinois Terminal R. Co. v. Thompson (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683.

distance of from 2 to 2½ feet. The open space between the cars when running or standing on opposite tracks in the said switchyard did not exceed three feet, whereby the space between the cars was not sufficient to enable brakemen to discharge their duties as such in the said yard with reasonable safety. About midway of the switchyard a public highway runs east and west, and crosses the main and switch tracks situated in the said yard. This highway is used and traveled by the public generally. On the date of the fatal accident, to wit, December 2, 1899, one of appellant's freight trains, upon which the decedent was employed and serving as a brakeman, was going south over appellant's road. It was composed of a locomotive engine and a large number of freight cars. Upon the arrival of this freight train at the aforesaid switchyard, it was run into the yard onto track No. 3, and was moved through the yards towards the south until the engine and a part of the cars thereof had crossed the aforesaid highway, when it was stopped, thereby causing a part of the train to block or obstruct said highway. It is alleged then that Coombs, the decedent, while acting in the line of his duty as a brakeman on said train, and in compliance with the rules of appellant controlling the operation of said train by its servants, and also in compliance with and in obedience to the laws of the state of Indiana prohibiting the obstruction of public highways, alighted from the train on the west side thereof, onto the said highway crossing, for the purpose of uncoupling the cars of the train, in order that it might be cut apart, and the cars thereof which were obstructing the highway crossing removed therefrom. When the train reached the switchyard, and at the time said Coombs alighted therefrom, it was about 9 o'clock at night, and very dark; there being no lights of any kind whatever either at any point in the switchyard or at the crossing of the said highway. Coombs, when he alighted from the train, and at the time he was engaged in the line of his work as hereinafter mentioned, neither saw nor heard any train on the side track immediately next to the track upon which his said freight train was standing. He was engaged in his duties east of track No. 2, and was between tracks No. 2 and No. 3, and was standing at the time of the accident as near to the latter track as it was possible for him to be, and was then and there engaged in uncoupling the cars of his train, and in giving and receiving signals from those in charge thereof. The engine attached to his freight train, together with other engines in the yard near by, was blowing off steam, and made such a noise that it was impossible for him to hear the running or approach of any train on track No. 2. While in the line of his duties and discharging the same as aforesaid stated, the defendant railroad company carelessly, negligently, and recklessly backed and run from the south a train consisting of 15 freight cars and a locomotive engine along,

over, and upon track No. 2; backing and running the said train over and across the said public highway. One of the cars of the said train in the north end thereof was a very large box car, and, including the projections thereof, was about 10 feet and over in width. There was no light upon the said train, and it was run and backed with no watchman or lookout thereon, and no signal whatever of its approach was given. The bell on the engine at no time was rung when the train was in motion. Neither was the engine whistle sounded at any time when the said train was being backed down to the said highway crossing. It is disclosed, in general, that no signal or warning whatever, of any kind, was given by the defendant of the approach of said train; and it is alleged that the engine bell of said train was not rung, nor was the engine whistle sounded, when the said train was within 80 rods of the said highway crossing, nor at any point when the train was approaching the said crossing where the decedent was engaged in uncoupling cars and in giving signals as aforesaid stated. Said train and cars struck and killed said decedent while engaged in the discharge of his duties as hereinbefore alleged. It is further charged that the defendant so negligently constructed its side tracks and switches at the said highway crossing where the decedent was killed as aforesaid that the space between the cars of the train upon which he was brakeman and the cars of the train by which he was killed did not exceed 2½ feet. Coombs had no knowledge whatever of the approach of the train at the time he was killed, and no warning was given him by the defendant of the danger to which he was exposed. Other facts relative to damages are alleged. At the close of the pleading it is alleged "that by reason of the defendant's negligence in not having a light or a watchman at said highway crossing, and in not having a light, signal, person, or watchman on said car and train thus pushed over said track and highway crossing, and in not sounding the whistle nor ringing the bell on said engine of said train, and by reason of said defendant's negligence in not giving any signal or warning whatever of the approach of said train to the crossing of said public highway, and by reason of said defendant's negligence in pushing a train of fifteen freight cars ahead of an engine attached thereto, and by reason of all the negligent acts and omissions of said defendant herein set forth, plaintiff alleges that said defendant negligently and carelessly injured and killed said George E. Coombs." The second paragraph of the complaint is substantially as the first; hence, if the latter is sufficient to withstand a demurrer, it necessarily follows that the former can be upheld.

It is insisted by counsel for appellee that the complaint sufficiently discloses several acts of negligence which will render the railroad company liable either at common law or under the employers' liability act (section 7083, Burns' Ann.

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St. 1901). When tested by the rules of pleading, we think it is evident that this action is not predicated upon any of the provisions of the employers' liability act of this state, for the rule is well settled that when a party, in his pleading, seeks to avail himself of the benefits of a statute, he is required by the averments thereof to bring himself fully within the provision or provisions of the statute upon which he relies. *Indianapolis, etc., Co. v. Foreman*, 162 Ind. 85, 96, 69 N. E. 669. A complainant who seeks to base an action on any of the provisions of the employers' liability act must by positive and direct averment of facts show that the action falls within the particular provision upon which he relies. With this rule appellee has not complied. It is insisted by counsel for appellant, among other reasons, that the complaint is insufficient on demurrer because it does not charge that appellant owed the decedent any duty in regard to the operation or running of its train in its switchyard at the time of the accident. It is said that the only duty owing by appellant was to properly construct and maintain its tracks. This duty, it is asserted, the law imposed upon the railroad company, and that a violation thereof is the only one charged in the complaint. The further contention is that the duty of appellant to have a light or watchman on its cars, or to give signals or warning in regard to the movement or running of its trains in the switchyard in question, was not a duty imposed by any statute or ordinance, and did not arise out of any general law applicable to the case. It is contended that, if any such duty existed, it should have been expressly shown under the averments of the complaint. It is claimed that it is not disclosed to have been the custom of appellant, previous to the accident, to have a lookout or watchman or light upon its cars when they were being backed or run on the tracks in the switchyard, or to give any warning or signals upon such occasions by ringing the engine bell or sounding the whistle. It is urged that under such circumstances no duty to do so could arise either by operation of law or in fact. The further contentions are advanced (1) that the paragraph wholly fails to disclose any duty of appellant, for a breach of which it would be liable for the death of appellee's decedent; (2) that there are no facts alleged to disclose that the deceased did not assume the risk or danger incident to the condition of the tracks.

The pleader, in drafting the complaint, in effect, at least, may be said to charge several acts of negligence on the part of appellant, whereby it is sought to show that the place where the decedent worked at the time of the accident was unsafe. In a case where several acts of negligence are sufficiently alleged in the complaint, a recovery upon the trial will be justified if it be established that the injury complained of was the result of one or more of said acts. *Long v. Doxey*, 50 Ind. 385; *Diamond, etc., Co. v. Edmonson*, 14

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Ind. App. 594, 43 N. E. 242, and cases there cited; Standard, etc., Co. v. Bowker, 141 Ind. 12, 40 N. E. 128; 14 Ency. Pl. & Prac. 345. As previously said, the theory of the pleading is that appellant had violated its duty in not providing and maintaining a reasonably safe place for the decedent to perform the duties which it exacted of him. It is settled that this is a duty which the master cannot delegate to another, and thereby relieve himself from liability to an injured servant who is free of contributory negligence. Whether the master makes no provision for the discharge of this duty, or charges the performance thereof to another, the negligence, if any, is the master's, because it is his duty which is neglected. Southern Indiana Ry. Co. v. Martin, 160 Ind. 280, 66 N. E. 886.

It is alleged in the complaint that, by reason of the distance between the switch tracks, and the extent to which freight cars protruded over and beyond the track, the open space between the cars when running or standing on adjacent tracks, like 2 and 3, did not exceed 3 feet, and thereby the space between the cars was rendered insufficient for brakemen to discharge their duties in said yard with reasonable safety. It will be observed that the complaint alleges generally that the defendant so negligently constructed its side tracks and switches at the highway crossing where the decedent was at work that the space between the cars of the train upon which he was working and the cars by which he was killed did not exceed 2½ feet. It is shown that he, at the time of the fatal accident, was engaged, in the line of his duty, at work between tracks 2 and 3, uncoupling the cars of his train which had been stopped on track No. 3, and was giving the required signals to the engineer—all, as disclosed, for the purpose or in order that the train might be cut apart, and the cars removed from the public highway crossing which they were temporarily obstructing. It appears that in performing this work he was acting in compliance with the rules and requirements of appellant railroad company. In respect to the duty which appellant owed to the decedent as its servant, the rule is not, as counsel for appellant contend, that the complaint should have positively charged that it, at the time of the accident, owed the decedent a duty. It was not essential to allege that a certain act or line of conduct was a duty imposed upon appellant by law, for, as a general rule, a legal duty may be implied from the acts averred in the pleading. It is elementary that a conclusion of law is not required to be alleged. Pittsburgh, etc., Ry. Co. v. Lightheiser (Ind. Sup.) 71 N. E. 218; City of Ft. Wayne v. Christie, 156 Ind. 172, 59 N. E. 385; Cribben v. Callaghan, 156 Ill. 549, 41 N. E. 178; Railroad Co. v. Coit, 50 Ill. App. 640. The rule affirmed by repeated decisions of this court is that a general averment of negligence has a technical signification, and, in an action for negligence, if a

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legal duty and a violation thereof are disclosed, the general averment of the negligence complained of will be sufficient on demurrer. *Ohio & Miss. R. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; *Ohio & Miss. R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *Citizens' St. Ry. Co. v. Jolly*, 161 Ind. 80, 67 N. E. 935.

Without further comments, we pass to the consideration of the contention that the pleading, under the facts therein, fails to show that Coombs, the deceased, did not assume the risk incident to the proximity of the tracks to each other. It will be observed that one of the grounds of negligence which the complaint apparently seeks to combine with others to establish that the premises where the deceased was at work in the line of his duty at the time of the fatal accident were rendered unsafe is the proximity to each other of tracks 2 and 3 in the switchyard. The paragraph is open to the objection, however, that it wholly fails to show in any manner that prior to the accident the deceased was ignorant of the alleged condition of these tracks. Therefore, under the circumstances, he, as appellant's servant, must be held to have assumed whatever risk or danger is attributable to the unsafe condition of the tracks in question. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 53 N. E. 235, and cases there cited; *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 53 N. E. 763; *Davis Coal Co. v. Polland*, 158 Ind. 607, 62 N. E. 492; *Chicago, etc., Co. v. Glover*, 154 Ind. 584, 57 N. E. 244. In the case last cited this court said: "Under the allegations of the complaint, appellee was required to prove not only that the decedent had no knowledge of said defects, but that he could not have known of them by the exercise of ordinary care. * * * If he had knowledge of said defects and danger, or could have had such knowledge by the exercise of ordinary care, then he assumed the risks resulting therefrom if thereafter he voluntarily continued in the service." If we consider the condition in which it is alleged appellant constructed and maintained the tracks in controversy as a separate and distinct ground or act of negligence which rendered unsafe the place where the decedent was at work at the time of the accident, or if we consider such act or negligence conjointly with the other alleged negligent acts to establish the unsafety of the premises, it must follow from either view of the case that the pleading is insufficient on demurrer, because there is nothing therein alleged to negative on the part of the decedent the assumption of the risk or danger incident to the condition of said tracks. For this reason, at least, if for no other, each paragraph of the complaint is bad, and the demurrer thereto should have been sustained.

Appellant's motion for judgment in its favor on the interrogatories was properly denied.

The other questions discussed by counsel are passed with-

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out consideration, for the reason that they may not arise again on another trial.

For the error of the court in overruling the demurrer, the judgment is reversed, and the cause is remanded to the lower court, with instructions to sustain the demurrer to each paragraph of the complaint, with leave to appellee, upon her request, to file an amended complaint.

FOSTER v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa, Feb. 10, 1905.)

[102 N. W. Rep. 422.]

Injury to Section Hand—Fall from Hand Car—Defective Appliances—Assumption of Risk.*

A section hand, who, long before the time when he lost his balance on a hand car from its lurching because of a wheel on one of the axles being loose, and the axle having too much play, knew of such condition of the car, and had not complained of it, will be *held* to have assumed the risk incident thereto.

Same—Same—Same.

Evidence in an action for injury to a section hand from his being run over by a hand car after he had lost his balance, jumped from it, and staggered back some distance, *held* to authorize a finding that, had the brake been in repair, the foreman might and probably would have stopped the car in time to have avoided the injury.

Same—Same—Contributory Negligence.

Whether a section hand on a hand car, who, of necessity, because of the large load on the car, stood sidewise to the handle bar, with but one hand on it, and who, when he turned his head to blow his nose, lost his balance, necessitating his jumping in front of the car, was guilty of contributory negligence, in view of his knowledge of the defects in the car, making it liable to lurch and hard to stop, is a question for the jury.

Same—Assumption of Risk—Promise to Repair.†

A section hand's assumption of risk from defective brake shoes on a hand car is suspended immediately on the foreman's promising him, when he called his attention to their dangerous condition, that he would repair them; and the risk is then the master's, as long as the servant may reasonably expect the promise to be performed.

Same—Defective Appliance.

Where a section hand on a hand car, without contributory negligence, lost his balance, and was obliged to jump off in front of the car, by reason of a defect in the car, making it lurch, the risk from which

*As to assumption of risks from defective appliances by employees, see foot-notes appended to *Carson v. Southern Ry. Co.* (S. Car.), 12 R. R. R. 337, 35 Am. & Eng. R. Cas., N. S., 337.

For the general principles involved in the doctrine of assumption of risks by railroad employees, see foot-notes appended to *Illinois Terminal R. Co. v. Thompson* (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683.

†See foot-notes appended to *Dowd v. Erie R. Co.* (N. J.), 12 R. R. R. 368, 35 Am. & Eng. R. Cas., N. S., 368; foot-note appended to *Atchison, etc., Ry. Co. v. Sledge* (Kan.), 10 R. R. R. 229, 33 Am. & Eng. R. Cas., N. S., 229.

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he had assumed, and there was evidence authorizing a finding that, but for want of repair of the brake, his assumption of risk from which was suspended, the car might and probably would have been stopped in time to prevent his being run over, a finding that his injuries were the direct consequence of the defective condition of the brake, making the employer liable therefor, is warranted.

Appeal from District Court, Cass County; N. W. Macy, Judge.

Action for damages. Verdict was directed for defendant, and from judgment thereon the plaintiff appeals. Reversed.

H. M. Boorman and Willard & Willard, for appellant.

Carroll Wright, John I. Dillie, and J. B. Rockafellow, for appellee.

LADD, J. The plaintiff was a section hand employed at Wiota. On the morning in question he and nine others, including the foreman, boarded a hand car, on which the tools ordinarily used by the men, together with their dinner pails, a water cask, and some plank, had been placed. They were going to work some five miles east of town. The plank had been placed on the north side of the car, and on the front end of it two men sat, and one man on the back end. Three men were at the back handle of the propelling level, facing the east. One man stood at the north side, and another at the south side, between the front and back handles, facing the east. Two men stood before the front handle, with their backs towards the east; the one to the north being the plaintiff. The four in front were somewhat crowded, so that the plaintiff took hold of the handle with his right hand only, and stood with his face turned somewhat to the south. After going about a mile eastward he turned his head back of the man next to the south to blow his nose, and just as he did so the car made a lurch to the north, and threw him out of balance, so that he lost his handhold, and jumped backwards in front of the moving car. After staggering some distance, he was struck by it on the leg, which was broken, thrown to the ground, and run over. The evidence was not such as to indicate any improper loading of the car, and the charge of neglect in this respect was not made out. It appears that the wheels on the hand car were eight or ten inches apart on each side, and were fastened to the axle, and it turned in the boxing below the frame, rather than the wheels on the axle. A cogwheel in the center turns the axle, and is worked by the propelling lever. One wheel was loose on the axle, and the axle had a play of two or three inches in the boxing; and, because of this, the car oscillated or swayed back and forth on the track. This the plaintiff well knew a long time before the accident, and, as he had made no complaint, must be held to have assumed the risk incident thereto. To the suggestion that he may not have comprehended the danger, it is enough to say that he had equal, if not a better, oppor-

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tunity for judging than the defendant. Bryce v. Ry., 103 Iowa, 665, 72 N. W. 780; Box v. Ry., 107 Iowa, 660, 78 N. W. 694; Branco v. Ry. (Iowa) 93 N. W. 97. He is not in a situation to complain of any defect in the car which may have caused him to leave it.

If the defendant is blamable at all, it is because of the failure of its foreman to stop the car in time to have avoided the injury. The latter was warned to stop the instant plaintiff lost his hold, and at once stepped on the brake, and did his utmost to bring the car to a standstill. The brake consists of two wooden shoes hung on bolts next to the wheels. There is a center bar, with a square piece or plate on top for the foot, and two levers extending from this to the bottoms of the shoes. By stepping on the center bar or plate, these shoes are pressed outward against the wheels. The shoes are covered with leather or rubber. The evidence tended to show that this leather or rubber had become so worn that it was inefficient in stopping the car. This condition had been called to the attention of the foreman by the plaintiff a day or two previous to the accident, and the latter had promised to repair it. On reliance upon this, plaintiff continued in employment.

The plaintiff testified that he did not know how far he sprang back, but that he struck the ground on both feet, facing the car, and that he staggered back 8 or 10 feet before it struck him. In his words: "It either rolled me along or shoved me along on the ties under the car. I remember being dragged along on the ties under the car. I could not tell how far. Probably the length of a rail—thirty feet. One wheel of the car ran over my head and broke my jaw. The cogwheel caught me and turned me around under the car." Other witnesses estimated that the car, after striking him, went from 12 to 20 feet. The speed of the car was variously estimated at from $2\frac{1}{2}$ to 6 miles an hour. The distance within which a car loaded as this was, with brakes in good repair, and under like conditions, could be stopped by a man of the weight of the foreman, was estimated by two witnesses at 2 to 4 feet, when going from $2\frac{1}{2}$ to 3 miles per hour, and at 4 to 6 feet when moving at 6 miles an hour, while another fixed the space at 12 or 14 feet when moving at the latter speed, and one-third as far when at the former. The jury might have found that, had the brake been in repair, the foreman might and probably would have stopped the car in time to have avoided the injury.

2. It cannot be held, as a matter of law, that plaintiff was guilty of contributory negligence. He could not well have kept both hands on the center bar, as then his left elbow would have interfered with his neighbor. Of necessity, he stood sidewise, and had merely turned his head to blow his nose when he lost his balance. Whether, in view of the condition of the axle and brakes, he failed to exercise reasonable care for his safety was an open question.

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3. Nor do we think he should be held to have assumed the risk incident to the defective brake shoes. He testified that one or two evenings previous to the accident he had called the foreman's attention to their dangerous condition, and he had promised to repair them. This obviated the effect of the waiver which must otherwise have been implied from his knowledge of their condition and continuance in employment. See *Ford v. Ry.*, 106 Iowa, 85, 75 N. W. 650. Appellee urges, however, that sufficient time within which to make the repair had not elapsed. The waiver does not continue until the employer may by reasonable diligence effect the repair, but is suspended eo instante upon the making of the promise. This is on the ground that the servant is influenced to continue work by the master's promise to repair. From that time on the risk is the master's, and not that of the servant, as long as the latter may reasonably expect the promise to be performed. Says Judge Cooley in his work on Torts, p. 559: "The assurances remove all ground for argument that the servant, by continuing the employment, engaged to assume its risks." And this language is employed in *Shearman & Redfield on Negligence*, § 96: "There can be no doubt that, when a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for any injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." *New Jersey & N. Y. R. Co. v. Young*, 49 Fed. 723, 1 C. C. A. 428; *Hough v. Ry. Co.*, 100 U. S. 213, 25 L. Ed. 612; *Roux v. Lumber Co.*, 85 Mich. 519, 48 N. W. 1092, 13 L. R. A. 728, 24 Am. St. Rep. 102; *McFarlan Carriage Co. v. Potter* (Ind. App.) 51 N. E. 737. *Burnes v. Windfall Mfg. Co.*, 146 Ind. 261, 45 N. E. 188, is not in point, for there the promise to repair was not general, but as soon as the present order run out. The distinction is pointed out in *McFarlan Carriage Co. v. Potter* (Ind. Sup.) 52 N. E. 209: "The promise to repair only has the effect of relieving him from his implied assumption of the risk for such length of time as would be reasonably sufficient in which to make the repairs or remedy the defect, and in which he might reasonably expect the same to be done. If the injury occurs within that period, the injured servant may recover, because he is relieved during that period from his agreement, implied by law from his knowledge, that he will serve on at his own risk. This is afforded to him because he may during that time reasonably expect the repairs to be made or the defect remedied. Where, however, the agreement to repair or remedy the defect is, as in this case, not to be begun until after the job on which the servant is then at work, the agreement is not operative until that time arrives, because, during the time which intervenes between the making of the promise and the time when the promise is to be

performed, the servant has no reason to expect the repairs to be made or the defect remedied. And hence during that time there is nothing to relieve him of his agreement implied by law from his continuation in the service with knowledge of the augmented risk caused by the defect, any more than during the time prior to making the promise to repair." As remarked in *Green v. Ry. Co.*, 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785: "If the emergencies of the master's business require him temporarily to use defective machinery, we fail to see what right he has, in law or natural justice, to insist that it shall be done at the risk of the servant, and not his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested and induced him to continue its use under a promise thereafter to repair it."

4. But the defect in the brakes had nothing to do with causing the plaintiff to leap from the car, and, as he had assumed the risk of the defective axle or boxing, that act cannot be attributed to any actionable negligence on the part of defendant. Nor can what plaintiff did be said to have resulted from any fault on his part. The foreman was shown to have put forth his best efforts to stop the car as soon as possible, and no fault can be found with what was done after plaintiff's situation was known. But the jury might have found that the injuries of plaintiff were the direct consequences of the defective condition of the brakes, and that such condition was due to defendant's negligence. The duty to equip hand cars with suitable appliances for stopping them, and to keep these in reasonable repair, will not be questioned; and, in omitting to remedy the defect in the brakes, the company may well have been found wanting in the exercise of that degree of care exacted by the law, from which injury to others was reasonably to be anticipated. Doubtless the particular situation might not have been foreseen, but this was not essential to making out a charge of negligence. Accidents as they occur are seldom foreshadowed; otherwise many would be avoided. If the act or omission is of itself negligent and likely to result in injury to others, then the person guilty thereof is liable for the natural consequences which occurred, whether he might have foreseen it or not. In other words, if the act or omission is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting therefrom, although he might not have foreseen the particular injury which did happen. *Cristianson v. Ry.*, 67 Minn. 94, 69 N. W. 640; *City of Dixon v. Scott*, 181 Ill. 116, 54 N. E. 897; *Hill v. Winsor*, 118 Mass. 251. See cases collected in 21 Am. & Eng. Ency. of Law (2d Ed.) 486 et seq.

It follows from what we have said that, upon the charge of negligence in failing to keep the brakes in repair, the cause should have gone to the jury.

Reversed.

MOBILE & O. R. CO. v. VALLOWE.
(Supreme Court of Illinois, Feb. 21, 1905.)

[72 N. E. Rep. 416.]

Injury to Employee—Negligence—Structures near Track.*

Where it is necessary to place posts for the support of a coal chute so near to a railroad side track as to render it dangerous for a person to ride on the side of a car in passing, it is not negligence in the railroad company toward its employees to so maintain them, if the employees are properly warned of the danger.

Same—Assumption of Risk—Structures near Track.†

A railroad brakeman cannot recover for injuries received in striking a coal chute close to a side track, if he had knowledge of its dangerous location, or was chargeable with such knowledge, as in that case he assumed the risk.

Same—Same—Same—Notice to Employee—Directing Verdict.

In an action against a railroad company for injuries to a brakeman from striking a coal chute standing close to a side track, where the evidence is conflicting as to whether plaintiff had previous notice of the dangerous location of the chute, the refusal to direct a verdict for defendant is proper.

Same—Negligence—Structures near Track—Evidence—Prior Accidents.‡

In an action for injuries to a railroad brakeman by striking a coal chute dangerously close to a side track, evidence that the chute had existed in the same condition for five or six years, and that no previous injury had occurred, is not admissible.

Instructions.

A judgment will not be disturbed because of an instruction which ignores some of the questions involved, where those questions were fully covered by other instructions, and the jury could not have been misled thereby.

Appeal from Appellate Court, Fourth District.

Action for personal injuries by Martin H. Vallowe against the Mobile & Ohio Railroad Company. A judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

Lansden & Leek and Charles Morrison, for appellant.
Bollinger, Winkelmann & Baer, for appellee.

CARTWRIGHT, J. Appellee brought this suit in the circuit court of Monroe county to recover damages on account of an injury sustained by him while in the employ of appellant as a brakeman. The suit was brought against appellant and the Willis Coal & Mining Company, but it was dismissed as to the mining company, and an amended declaration was filed, charging the appellant with negligence in permitting posts to stand so near its side track as to not leave sufficient

*See foot-note appended to *Norfolk & W. Ry. Co. v. Cheatwood's Adm'x* (Va.), 13 R. R. R. 850, 36 Am. & Eng. R. Cas., N. S., 850.

†See foot-notes appended to *Illinois Terminal R. Co. v. Thompson* (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683.

‡As to whether evidence of similar accidents or acts of negligence are admissible, see foot-note appended to *Nelson v. Union R. Co.* (R. I.), 12 R. R. R. 633, 35 Am. & Eng. R. Cas., N. S., 633.

room for the plaintiff to perform his work, and in failing to notify him of the danger arising therefrom, and alleging that while in the performance of his duties, and while on the ladder, ascending the side of a car, with due care and caution for his own safety, he was knocked off by a post and injured. The plea was the general issue, and upon a trial there was a verdict for \$1,500, on which judgment was entered. The Appellate Court for the Fourth District affirmed the judgment.

It is contended that the trial court erred in refusing to direct a verdict of not guilty, on the motion of the defendant, at the close of the evidence, for the reasons that the defendant was guilty of no negligence in using the side track with the posts situated as they were, that the plaintiff assumed the risk of danger from the posts, and that he was guilty of negligence in attempting to ride upon the side of the car while passing the posts. As related to these questions, the evidence was as follows: Plaintiff was 32 years old, and commenced work for the defendant on August 3, 1901, as a brakeman. On December 31, 1901, he was with his train at Willisville Station, where the Willis Coal & Mining Company has a coal mine. He had been on that division about a month, and had frequently been at that station. There was a side track there, used for pushing empty cars under a coal chute, to be filled with coal and hauled out on the main track. The chute was supported by upright posts eight inches square, and about seven feet apart. There was a distance of about one foot between the side of a coal car and the row of posts. The day was dark, with a misting rain, and smoke did not rise from the ground. A number of cars were being backed in under that coal chute, where there was a good deal of steam, and a great deal of noise from the coal. Plaintiff attempted to climb up the side of the third car from the rear, and was struck by a post and fell off, and his thigh bone was broken.

The only evidence touching the averment of the declaration that the defendant negligently permitted the posts to stand near the side track was the testimony of several witnesses for the defendant that the coal chute, and posts supporting the same, were properly constructed; that the posts were necessary for the support of the coal chute, and were located as far from the track as it was possible to locate them and operate the coal chute; and that it was necessary to set them in that position in order to operate the shaker and the screens and screen the coal. It was conceded that the posts were so near to the passing cars that a brakeman could not safely climb upon the side of a car while passing the posts, and that he would either have to get on the car at some other time, or climb upon the end of the car; but the only evidence in the case was that such construction was necessary and proper, and that there was no fault or negligence in that respect.

The defendant was bound to exercise ordinary care to provide a reasonably safe place for plaintiff to do his work, but, if reasonable care was exercised, and there was no fault or negligence on the part of defendant in having the posts near the track, it would not be liable merely because there was danger. If the defendant furnished as good and safe a place to work as reasonably could be furnished, it would not be guilty of negligence. The operation of trains is attended with danger, and liability in such a case does not depend upon the presence of danger, but upon the existence of negligence on the part of the employer. 3 Elliott on Railroads, §§ 1268, 1308. It was not sufficient to show danger on account of the location of the posts, but it was also necessary to show that danger arose from some fault or negligence of the defendant. The cases where railroad companies have been held liable for injuries resulting from posts or structures near the track have been where negligence was imputed to them. In *Chicago, Burlington & Quincy Railroad Co. v. Gregory*, 58 Ill. 272, the ground of liability was that the mail catcher was negligently placed so near the track as to be a source of danger, when it might have been more distant. In *Chicago & Iowa Railroad Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54, the telegraph pole was permitted, by the negligence of the railroad company, to be in dangerous proximity to the track. So, also, in *Chicago & Alton Railroad Co. v. Howell*, 208 Ill. 155, 70 N. E. 15, the liability depended upon the negligence of the defendant both in respect to the proximity and kind of switch stand. There was no evidence tending to show that the defendant was guilty of negligence in having the posts where they were, but the only evidence was that it was not guilty of any negligence in that respect.

The defendant, however, might be guilty of negligence in failing to warn the plaintiff of the danger, as alleged in the declaration. If the plaintiff had, or by the exercise of reasonable care on his part would have had, knowledge of the situation of the posts and the danger, the defendant would not be liable for a failure to warn and instruct him against such danger. *Herdman-Harrison Milling Co. v. Spehr*, 145 Ill. 329, 33 N. E. 944. But if the danger which was known to the defendant was unknown to the plaintiff, and would not be ascertained by him in the exercise of ordinary care and prudence, it became the duty of the defendant to give warning, and for a failure to do so it would be liable. *Chicago & Alton Railroad Co. v. Kerr*, 148 Ill. 605, 35 N. E. 1117. If the danger was unknown to the plaintiff, and was not obvious to one exercising ordinary care, there might be a liability. On these questions the evidence was contradictory. Plaintiff testified to the condition of the weather, the smoke, and the noise, and said that when about 30 feet away from the first post he attempted to climb on the side of the car to reach the brake in the center of the car, which it would be nec-

essary for him to set; that he was swinging around to the rear of the car to get to the brake when he was struck by the post; that he did not know the post was there; and that he was never notified or warned by any one of the proximity of the posts to the track. On the part of the defendant there was testimony that the conductor cautioned the plaintiff to be careful about running through the chute—that it was dangerous, and he was liable to get hurt—and not to ride on the side of the cars while working around the chute. The top foreman at the mine testified that the plaintiff was between the posts, which were only 7 feet apart, and was not 30 feet from the first post, as he had testified; that plaintiff started to climb on a passing car, when the witness caught hold of him and told him not to do that, or he would get hurt; that he told the plaintiff to let the cars go by, and they would not hurt anything, but that, just as the witness turned around, plaintiff caught the step of the third car between the posts, and just stepped on when he was knocked off. This witness was contradicted by the plaintiff, who was called in rebuttal, and testified that he did not see the witness; that the witness did not have him by the arm; and that no one spoke to him or said anything to him or caught him by the clothes. If the plaintiff was guilty of contributory negligence, he could not recover; but his own testimony tended to prove not only that he was ignorant of the situation of the posts, but that the circumstances were such that the court could not say, as a matter of law, that he was guilty of negligence in not learning of their position and the danger. It is also the settled rule that the plaintiff could not recover for injuries caused by dangers and defects of which he had knowledge or was chargeable with knowledge, on the ground that he assumed the risk of all such dangers of the service. If he did not know of the situation of the posts and the danger incident thereto, and was not chargeable with such knowledge, and the danger was not ordinarily incident to the service, he did not assume the risk, under his contract of employment. In view of his testimony, the court did not err in refusing to direct a verdict for the defendant.

The next point raised is that the trial court erred in refusing to permit the defendant to prove that the coal chute, and side tracks under it had existed in the same condition and had been in daily, continual use for five or six years, and that no injury had ever occurred therefrom. Where the question of notice of a dangerous defect is involved, evidence of prior similar accidents has been deemed competent on that question (*City of Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418); and perhaps it has been intimated that such evidence tends to show that a place is dangerous, on the ground that the danger or safety of a construction is proved by experience in the use of it. If that were true, it would be too plain for argument that the rule would work both ways, and,

if evidence of previous accidents is admissible to show the dangerous character of a place, evidence that no accident had occurred must be admissible on the other side to show that it is not dangerous. In either case, the fact that an injury had or had not occurred would involve an inquiry into all the circumstances, and the investigation of collateral questions. The legitimate purpose of such evidence is to show notice, and in *Hodges v. Bearse*, 129 Ill. 87, 21 N. E. 613, it was held not competent to prove that no accident had happened in the use of an elevator during the 4½ years it had been in use, because such evidence would only tend to distract the attention of the jury by a multitude of collateral issues. There was no error in excluding the offered evidence.

It is urged that the court erred in giving and refusing instructions. The first instruction given for the plaintiff was argumentative, and was evidently founded on a statement made in an opinion discussing a question of fact. It stated "that the law does not require that a brakeman on a freight train should know all the defects of construction and obstruction that may be along the line of the railroad, and that he should neglect the performance of his duties as a brakeman to be on the lookout for such obstructions and defects which may be dangerous." While a brakeman is not bound, as a matter of law, to know of all obstructions or defects, or to neglect his duty to be on the lookout for them, he is bound to use ordinary care to observe his surroundings and avoid danger, and the instruction ignored all questions of that kind. The jury, however, were fully instructed, at the request of the defendant, on that subject. They could not have failed to understand from the instructions which were given that the plaintiff was bound to exercise reasonable care for his own safety, and if he knew, or by the exercise of ordinary care could have known, that the posts were too near the side of the car to enable him to climb upon the side with safety, and he attempted to do so, he could not recover. We do not think the jury could have been misled by the first instruction. The other instructions complained of were not improper, and there was no error in refusing or modifying instructions asked by the defendant.

We find no error in the record calling for a reversal of the judgment of the Appellate Court, and accordingly it is affirmed.

Judgment affirmed.

ATLANTA & W. P. R. CO. *v.* WEST.

(Supreme Court of Georgia, Jan. 26, 1905.)

[49 S. E. Rep. 711.]

Who Are Employees.*

To create the relation of master and servant there must be some contract or some act on the part of one person which expressly or impliedly recognizes another as his servant.

Duty to Volunteer.†

One into whose service another volunteers without his assent, express or implied, is not under the duties of a master toward a servant, or

*For authorities in this series on the question as to who are, and are not, employees, see *Ederle v. Vicksburg, etc., R. Co. (La.)*, 11 R. R. R. 547, 34 Am. & Eng. R. Cas., N. S., 547 (where switching at intersections for both companies was done by employees of one of them, there was no privity of relation between such employees of one company and the other company); *Huntzicker v. Illinois Cent. R. Co. (C. C. A.)*, 11 R. R. R. 555, 34 Am. & Eng. R. Cas., N. S., 555 (person holding train-master's permit to ride on freight trains in the district, to acquire familiarity with the duties of a flagman, was an employee of the railroad when killed in a collision between its trains, while riding on one of them with its conductor's consent); *St. Louis S. W. Ry. Co. v. Smith (Ark.)*, 8 R. R. R. 1, 31 Am. & Eng. R. Cas., N. S., 1 (servant employed by a corporation created under the laws of one state, and operating a railroad commencing at the terminus of a railway company of the same name, organized under the laws of the same state, was not an employee of the latter company); *Gulf. C. & S. F. Ry. Co. v. Shelton (Tex.)*, 8 R. R. R. 634, 31 Am. & Eng. R. Cas., N. S., 634 (existence of relation where switching crew worked for two companies); *Setterstrom v. Brainerd & N. M. Ry. Co. (Minn.)*, 8 R. R. R. 500, 31 Am. & Eng. R. Cas., N. S., 500 (company not liable for injury to passenger from negligence of person employed by head brakeman as his substitute); *Lima Ry. Co. v. Little (Ohio)*, 6 R. R. R. 162, 29 Am. & Eng. R. Cas., N. S., 162 (relation a question for jury); *Chaney v. Louisiana & M. R. R. Co. (Mo.)*, 8 R. R. R. 333, 31 Am. & Eng. R. Cas., N. S., 333 (volunteer riding free and assisting in handling baggage is not an employee); *Missouri, K. & T. Ry. Co. of Texas v. Reasor (Tex.)*, 3 R. R. R. 281, 26 Am. & Eng. R. Cas., N. S., 281 (relation between railroad company and one acting as express messenger, and also, with its consent and approval, as its baggageman); note, 16 Am. & Eng. R. Cas., N. S., 550; *Ward v. Louisville & N. R. Co. (Tenn.)*, 7 Am. & Eng. R. Cas., N. S., 776; *Cleveland, T. & V. R. Co. v. Marsh (Ohio)*, 20 Am. & Eng. R. Cas., N. S., 54; *Stacker v. Louisville & N. R. Co. (Tenn.)*, 20 Am. & Eng. R. Cas., N. S., 704 (employment of boy to assist in revolving turntables, sufficiency of evidence); *Mickelson v. New East Tintic Ry. Co. (Utah)*, 20 Am. & Eng. R. Cas., N. S., 855 (person requested by engineer to assist in management of train); *Wagen v. Minneapolis & St. L. R. Co. (Minn.)*, 17 Am. & Eng. R. Cas., N. S., 438 (acceptance of volunteer's services); *Goodrich v. Kansas City, etc., Ry. Co. (Mo.)*, 19 Am. & Eng. R. Cas., N. S., 137 (sufficiency of evidence of employment where traffic arrangement between companies).

†As to the care due from railroad companies to volunteers performing services for them, see note, 17 Am. & Eng. R. Cas., N. S., 445 (liability for injuries to volunteers); *Harris v. Southern Ry. Co. (Ky.)*, 8 R. R. R. 753, 31 Am. & Eng. R. Cas., N. S., 753 (liability for injury to boy voluntarily assisting trainmen before he alighted from moving train at their direction); *Cleveland, T. & V. R. Co. v. Marsh (Ohio)*, 20 Am. & Eng. R. Cas., N. S., 54 (care due person invited by servant to assist); *Wagen v. Minneapolis & St. L. R. Co. (Minn.)*, 17 Am. & Eng. R. Cas., N. S., 438; *Ward v. Louisville & N. R. Co. (Tenn.)*, 7 Am.

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required to anticipate or discover the peril of such volunteer, but is only bound, relatively to such volunteer, to use care not to injure him after notice of his peril.

Liability.

Where a defendant has been guilty of no breach of any duty owing to the plaintiff, there can be no legal liability.

Duty to Volunteer—Unauthorized Request of Servant—Non Sui Juris.

Where a volunteer engages in work undertaken in compliance with an unauthorized request of an employee of the defendant, the latter owes him none of the obligations of a master toward a servant, but is only bound to use care not to injure him after notice of his peril. The fact that the volunteer is of tender years, and without sufficient mental capacity to appreciate the danger, while it might be an element of notice to the defendant of the peril of the volunteer, cannot change the relations of the parties, or impose upon the defendant any duty not ordinarily imposed by law relatively to volunteers. *Rhodes v. Georgia R. & Bkg. Co.*, 10 S. E. 922, 84 Ga. 320, 20 Am. St. Rep. 362, in part disapproved.

Infancy of Plaintiff.†

If the defendant had been negligent, and relied upon the concurrent negligence of the plaintiff to defeat or diminish the recovery, then the infancy of the plaintiff would be material to the determination of his diligence; but plaintiff's infancy cannot change the relations of the parties, or supply the place of negligence on the part of the defendant.

(Syllabus by the Court.)

Error from City Court of Newnan; A. D. Freeman, Judge.

Action by Willis West, administrator, against the Atlanta & West Point Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dorsey, Brewster & Howell, W. G. Post, and H. A. Hall, for plaintiff in error.

W. C. Wright and J. B. S. Davis, for defendant in error.

SIMMONS, C. J. An action for damages for personal injuries was brought by Simmie L. West, a minor, by his next friend, against the Atlanta & West Point Railroad Company. Pending this action Simmie L. West died, and his duly appointed and qualified administrator was made a party in his stead. To the petition as originally filed the defendant had demurred. Subsequently the petition was amended in several particulars. The defendant renewed its grounds of demurrer, and also filed other demurrers to the petition as amended. The court overruled the demurrers, and the defendant excepted. The petition, after amendment, set up the following facts: On the morning of June 14, 1901, a

& Eng. R. Cas., N. S., 776 (liability for injuries to volunteers); *Stacker v. Louisville & N. R. Co.* (Tenn.), 20 Am. & Eng. R. Cas., N. S., 704 (liability for injury to boy requested by employee to assist in revolving turntable).

†As to the care required of minors for their own protection, see foot-note appended to *Heinzle v. Metropolitan St. Ry. Co.* (Mo.), 13 R. R. R. 107, 36 Am. & Eng. R. Cas., N. S., 107; foot-notes appended to *Poland v. Union R. Co.* (R. I.), 12 R. R. R. 648, 35 Am. & Eng. R. Cas., N. S., 648; *Parker v. Wash. Elec. St. Ry. Co.* (Pa.), 11 R. R. R. 610, 34 Am. & Eng. R. Cas., N. S., 610; *Cleveland, etc., Ry. Co. v. Miles* (Ind.), 11 R. R. R. 536, 34 Am. & Eng. R. Cas., N. S., 536.

freight train of the defendant became uncoupled because of a defective or broken coupling. For the purpose of repairing such coupling, and while the repairs were being made, a portion of the train stood upon and obstructed the crossing. One of the tools used by the train hands in repairing the coupling was an iron crowbar weighing about 50 pounds. While the repairs were in progress, young West, who came thither on his way to perform an errand for his father, after waiting for some time for the crossing to be cleared, went to the caboose or cab of the train to inquire when the crossing would be clear. When he approached the caboose, one of the brakemen on the train came up with a lot of tools which had been used to repair the coupling, among them the above-mentioned iron crowbar, and requested West to ascend the platform of the caboose and open the door so that the tools could be laid in the caboose. West, seeing no danger to himself in complying with this request, ascended the platform, and was proceeding to unbolt and open the door, when the brakeman handed him the crowbar, standing it up endwise, and letting one end rest on the platform, and requested West to take hold of it. West took hold of the crowbar, and was supporting it with one hand, the other being upon the door knob, and West being in the act of opening the door, when "suddenly and violently, and without warning signal, and without warning to" West, the train was coupled together, the section attached to the engine coming in contact with the other section, of which the caboose formed a part, "with great force, and said train was then suddenly and quickly jerked and put in motion and with a sudden jerk, by reason and on account of which sudden coupling and contact and sudden starting and jerking of said train" West was thrown back and down, the door slammed upon his right hand, and the crowbar fell upon and broke his right leg. West suffered great pain in his hand and leg. The injury to the leg resulted in necrosis, and the leg had finally to be amputated. When West was requested by the brakeman to ascend the platform and open the door of the caboose and take hold of the crowbar, both sections of the train were perfectly still, and he had no reason to suppose or presume that they would be suddenly coupled together with great force and jar, and the train put in motion with a jerk, without notice to him. The brakeman was a man of long experience, and apparently about 50 years of age, while West was only 15 years and 2 months of age, and "without mental capacity, knowledge, and experience to know or comprehend that there was any danger" in complying with the request of the brakeman, "and without sufficient knowledge, mental capacity, and experience to avoid any danger" to which so doing might subject him. On account and by reason of West's tender years and inexperience he did not know, while he was on the platform, that the train might be coupled together suddenly and

violently, and without warning, and put in motion with a sudden jerk. At the time of the injury "West did not have the mental capacity, knowledge, and experience of an ordinary boy fourteen years old." West was without fault, and in the exercise of due care, diligence, and circumspection, and his injuries were due wholly to the carelessness and gross negligence of defendant, its officers, agents, and employees. The petition charged that "defendant was negligent on account of its said employee requesting [West] to ascend the platform of said cab and open said door, and in handing said iron crowbar up to [West] with the request that [West] take hold of same; and especially was defendant, its agents, officers, and employees, grossly negligent in suddenly, violently, and with great force and jar coupling said sections of said train, and causing them to come in contact as aforesaid, and then suddenly putting said train in motion with a jerk while petitioner occupied the position hereinbefore described, and in so coupling and starting said train without signal, and without any notice or warning to [West]." Damages were laid in the sum of \$15,000.

The defendant's demurrers were based upon several grounds. It demurred generally, and on the ground that the petition failed to show that on the occasion when West was injured defendant owed him any duty, or that the acts and doings of the defendant were any breach of any duty owing by the defendant to West. The other grounds of demurrer it is unnecessary here to mention.

1. It is virtually conceded that West was a volunteer, and not a servant of the defendant. There was no contract of employment, nor any act on the part of any authorized agent of the defendant which expressly or impliedly recognized West as the servant of the company. *Rhodes v. Georgia R. & Bkg. Co.*, 84 Ga. 320, 10 S. E. 922, 20 Am. St. Rep. 362. "A person cannot be subjected, without his own consent or that of his agent, to the obligations which the law has attached to the contract of hiring." 2 Labatt, Mast. & Serv. § 630.

2. One who, without any employment whatever, or at the request of a servant who has no authority to employ other servants, voluntarily undertakes to perform service for the master, is a mere volunteer, and not entitled to that degree of diligence on the part of the master which the latter is bound to exercise with reference to his servants. There are a great many cases which state that such a volunteer stands in the place of a servant, but in each such case which we have examined this position was taken in order to defeat the claim of the volunteer. In other words, the court held that the volunteer certainly stood in no better position than that of a servant, and that, conceding he stood in the position of a servant, he could not recover. Such cases not infrequently

arise where, if the volunteer had been a servant, he could not recover because injured by the negligence of a fellow servant in the course of their common employment. A number of such cases will be found in the note to section 631 of Labatt on Master and Servant, vol. 2. In Georgia the rule as to the liability of the master for the negligence of fellow servants had been abrogated in railroad cases, and the claim of a volunteer cannot be defeated by treating him as though he were a servant. It is necessary to assign him to his true position. He is not a servant, and cannot charge the defendant with the obligations of a master. The defendant does not, as master, owe the volunteer any duty whatever. The obligations of master and servant do not arise between them. The defendant is only bound not to injure the volunteer willfully, and to use care not to injure him after notice of his peril. See *Church v. Railroad Co.*, 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861; *Everhart v. Railroad Co.*, 78 Ind. 292, 41 Am. Rep. 567.

3. The petition clearly does not make out a case of injuries inflicted willfully, or because of a want of care after notice of West's peril. There is no allegation that the defendant's agents or employees who coupled and moved the train knew anything of West's danger or of his position. Even the brakeman who requested West to get upon the platform does not appear to have had any notice that West's mental capacity was less than that usually possessed by boys of his age. The train was at a public crossing, but it does not appear that West could not get by it, or that this had anything to do with his compliance with the brakeman's request to assist him. The brakeman does not appear to have had any authority to make West or any one else the servant of the defendant. There is no allegation that the brakeman had any authority, and his request cannot be imputed to the defendant. The brakeman had no authority to invite West to get upon the platform, and the defendant was under no duty to anticipate that he would do so, or to see that no injury resulted. Leaving out of consideration the minority of West, the case is simply that of a volunteer who places himself in a position of danger, and who is injured by acts of the defendant, which, relatively to a volunteer, do not constitute negligence. So far as appears from the petition, the defendant was guilty of no breach of any duty which it owed West, and therefore cannot be liable. Legal liability arises only upon the breach of some legal duty.

4. We think enough has been said to show that, had West been an adult, the defendant would not have been liable. West voluntarily engaged in work undertaken in compliance with the unauthorized request of the brakeman, and the defendant owed West none of the obligations which grow out of the relation of master and servant. The defendant was

bound, through its agents and employees, to use care not to injure West after notice of his peril, and was bound not to injure him willfully; but no breach of this duty appears. Defendant in error, however, contended that the demurrers were properly overruled because of the allegations as to the minority and mental deficiency of West, relying upon the case of *Rhodes v. Georgia R. & Bkg. Co.*, 84 Ga. 320, 10 S. E. 922, 20 Am. St. Rep. 362. After examining that case, and also many decisions by other courts, we think this contention unsound. Infancy or want of mental capacity on the part of the plaintiff is often very material where the defense calls in question the plaintiff's own diligence. In other words, where the defendant has been negligent, and claims that the plaintiff could, by the exercise of due care, have avoided the injury, or that the plaintiff did not use due diligence to lessen the damages, or that plaintiff's negligence contributed to the injury, then the plaintiff's infancy or mental capacity is material. Whenever the plaintiff's diligence is under investigation, his mental capacity is relevant, as will be seen in many decisions in this and other states. In investigating the diligence of the defendant, the plaintiff's infancy or evident lack of mental capacity may sometimes become relevant as an element of notice to defendant of the plaintiff's peril. But in determining the relations of the parties the infancy of the plaintiff is not material, nor can it supply the place of negligence on the part of the defendant. West was a mere volunteer. His age and mental capacity could not change this. If young and mentally deficient, he was no less a volunteer, relatively to the defendant, than if old and experienced. The defendant did not, as master, owe him any duty. The defendant was not guilty of a breach of any duty which it did owe him. The infancy of West could not supply the place of negligence on the part of the defendant, and there can be no recovery. The *Rhodes Case*, *supra*, seems to conflict with this view, though the headnote recognized that there could be no recovery unless the defendant had been negligent. The decision in that case is by but two judges, and not binding, and, in so far as it conflicts with what is here ruled, will not be followed. It has more than once been criticized by able law writers (3 Elliott on Railroads, § 1305; 2 Labatt on Master and Servant, § 636), and is, we think, unsound. We are clear in the present case that West's lack of mental capacity did not change his relations toward the defendant, or impose upon it any of the obligations which ordinarily arise from the relation of master and servant; that the petition showed no breach of duty toward West as a volunteer; that West's infancy cannot supply the place of negligence on the part of the defendant; and that the court below erred in overruling the defendant's demurrer. See, in relation to the relevancy of the volunteer's infancy,

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Flower v. R. Co., 69 Pa. 210, 8 Am. Rep. 251, and the numerous cases cited in the notes in the two text-books last above cited.

Under the above view of the case it will not be necessary to notice all of defendant's special demurrers.

Judgment reversed. All the Justices concur.

SOUTHERN RY. CO. v. BONNER.

(Supreme Court of Alabama, Nov. 21, 1904.)

[37 So. Rep. 702.]

Testimony on Former Trial.

Testimony of a witness that he did not know where one who testified on a former trial lived, but that, several months previously he saw the former witness, who told him that he was living in Texas, was not a sufficient predicate for evidence as to the testimony of the former witness.

Same.

Evidence as to what was testified to on a former trial is only admissible where the witness has left the state permanently, or for such an indefinite time that his return is uncertain.

Evidence—Speed of Train.

Where decedent was killed in a collision between the train of which he was engineer and a train of defendant at a place where the tracks crossed, in an action for the death, the testimony being conflicting as to whether decedent's train stopped within 100 feet of defendant's track before going on the crossing, as required by Code 1896, § 3441, it was not error to allow a witness who had testified about the speed of that train to testify that the speed was about the usual rate of crossing another railroad after it had stopped.

Same—Power of Headlight.

A hypothetical question to an experienced locomotive engineer as to how far a headlight could be seen was not objectionable as calling for a conclusion.

Same—Cause of Collision—Conclusion of Witness.

In an action for death caused by the train of which decedent was engineer colliding with a train of defendant at a point where the tracks crossed, a brakeman on defendant's train testified that he thought decedent's train would surely stop for the crossing, that witness' engineer must have put on his air just about the time of the collision, and that the position of the engines showed that defendant's train was the one struck: *held*, that it was proper to exclude the testimony, since the first statement was a mere mental operation, and the other two conclusions.

Contributory Negligence—Duty of Engineer to Know That Track Is Clear—Question for Jury.

In an action for death caused by a collision between the train of which decedent was engineer and a train of defendant at a point where the tracks crossed, evidence considered, and *held*, that the question whether the decedent was guilty of contributory negligence in failing to observe Code 1896, § 3441, making it the duty of engineers to know that the way is clear before proceeding over a crossing, was for the jury.

Crossings—Duty of Engineer to Know That Track Is Clear—Construction of Statute.

Code 1896, § 3441, provides that engineers of railroad trains, after

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stopping, and before proceeding to run a train over a railroad crossing, must know the way to be clear: *held*, that the statute means not only that the crossing is free from immediate obstruction, but free from danger of such obstruction as ought reasonably to be expected; but it does not require knowledge that the way will certainly remain clear against all after-occurring or extraordinary happenings.

Death of Engineer—Collision at Crossing of Railroads—Negligence—Question for Jury.

In an action for the death of an engineer of a train in a collision between his train and one of defendant's at a point where the tracks crossed, the question of defendant's negligence *held*, under the evidence, one for the jury.

Willfulness—Instruction.

Defendant requested the court to charge that, to constitute willful injury, there must be a design, purpose, or intent to do wrong and inflict the injury, and that, unless the evidence satisfied the mind of each juror that defendant's engineer, with design and purpose and intent to do wrong and inflict injury on some one, then they could not find for plaintiff: *held*, that the instruction was properly refused as incomplete and obscure.

Willfulness, Wantonness, and Intentional Wrong—Pleading and Proof.

Code 1896, § 3441, provides that railroad engineers, after stopping, and before running a train over a railroad crossing, must know the way to be clear. In an action for death caused by a collision of decedent's train with one of defendant's trains at a point where the tracks crossed a count of the complaint charged that the death was caused by the willful, wanton, or intentional negligence of the employees in charge of defendant's train in running the train forward and over the crossing without stopping: *held*, that wantonness and willfulness short of intentional wrongdoing might have warranted a recovery under such count.

Death of Engineer—Collision at Crossing of Railroads—Headlights as Warnings.*

In an action for the death of a locomotive engineer in a collision in the nighttime between his train and one of defendant's trains at a point where the tracks crossed, an instruction that the usual purpose of a headlight is to enable the engineer of the engine provided with it to see the track, and that if defendant's engineer, by keeping a careful lookout with a proper headlight, would not have discovered the peril in time to avoid the collision, plaintiff could not recover because of the absence of a headlight, was properly refused, since a headlight is not only serviceable to the engineer using it, but a warning to others.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

*For authorities in this series on the question whether locomotive headlights are warnings to the public of the approach of trains, the absence of which may render a railroad company liable for injuries inflicted by trains, see *Dilas v. Chesapeake & O. Ry. Co.* (Ky.), 7 R. R. R. 712, 30 Am. & Eng. R. Cas., N. S., 712 (failure to have headlight not actionable negligence when fog would have rendered it useless); *Erickson v. Kansas City, etc., R. Co.* (Mo.), 7 R. R. R. 300, 30 Am. & Eng. R. Cas., N. S., 300 (absence of headlight and signals when flagman was injured by train); *Chicago City Ry. Co. v. Fennimore* (Ill.), 6 R. R. R. 644, 29 Am. & Eng. R. Cas., N. S., 644 (excessive speed, absence of signals, and insufficient headlight); *Campbell v. St. Louis & Suburban Ry. Co.* (Mo.), 9 R. R. R. 248, 32 Am. & Eng. R. Cas., N. S., 248; *Ensley v. Detroit United Ry.* (Mich.), 8 R. R. R. 452, 31 Am. & Eng. R. Cas., N. S., 452; *Central of Georgia Ry. Co. v. Hardin* (Ga.), 1 R. R. R. 499, 24 Am. & Eng. R. Cas., N. S., 499; *Sullivan v. New York, N. H. & H. R. Co.* (Conn.), 20 Am. & Eng. R. Cas., N. S., 108 (backing train over crossing).

Southern Ry. Co. v. Bonner

Action by J. J. Bonner, as administrator de bonis non of the estate of Charles M. Bryan, deceased, against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This suit was originally brought by Pearl O. Bryan, as administratrix of the estate of Charles M. Bryan, deceased, against the Southern Railway Company, to recover \$30,000 damages for the killing of the plaintiff's intestate. This is the second appeal in the case. 28 South. 445. After the remandment of the cause on the former appeal, the complaint was amended by substituting for the original plaintiff the present appellee, J. J. Bonner, as administrator de bonis non of the estate of Charles M. Bryan, deceased.

On the last trial, from a judgment in which the present appeal is prosecuted, the cause was tried, as stated in the opinion, upon two counts of the complaint. The substance of these counts are sufficiently shown in the opinion. The facts of the case are substantially the same as presented on the former appeal, to which special reference is here made, with the exception of the testimony of one Arthur Lawrence, who was the fireman on the engine of which intestate was engineer at the time of the accident. Lawrence did not testify on the first trial. The substance of his testimony and the other facts of the case necessary to an understanding of the decision upon the present appeal are sufficiently stated in the opinion.

Upon the introduction of all the evidence the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe the evidence, they must find for the defendant. (2) If the jury believe the evidence, they cannot find a verdict for the plaintiff under the fourth count of the complaint. (3) I charge you, gentlemen of the jury, that there is no evidence in this case showing willful, wanton, or gross negligence on the part of the defendant's engineer, Mosby, and unless the evidence reasonably satisfies you that the defendant, its agents, servants, or employees, were guilty of willful, wanton, or intentional wrong, then your verdict must be for the defendant. (4) I charge you, gentlemen of the jury, that before you can find a verdict for the plaintiff in this case you must be reasonably satisfied from all the evidence in this case that the defendant's engineer, Mosby, ran his train against the engine upon which the plaintiff's intestate was riding with the consciousness that the act which he was committing would likely result in death or injury to the plaintiff's intestate, or some other person on the train or engine of the Louisville & Nashville Railroad. (5) The law would not authorize or justify you in assessing damages against this defendant, however negligent it may have been, if Bryan was himself guilty of proximate contributory negligence. (6) I charge

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you that the evidence in this case does not show willful, wanton, or intentional negligence on the part of the defendant's agents or employees. (7) You cannot, by your verdict, punish the defendant at all, or compel the defendant to pay any damages in this case, if the evidence also satisfies you that Bryan was not as careful as he should have been in approaching and attempting to pass the crossing, and that thereby he directly and proximately contributed to cause his own misfortune." "(9) The court charges the jury that if you believe all the evidence in this case you cannot find for the plaintiff under the first count of the complaint. (10) I charge you, gentlemen of the jury, that if you believe the evidence in this case, before you can find a verdict for plaintiff, you must find that the defendant's servants were guilty of wanton, willful, or intentional negligence. (11) I charge you, gentlemen of the jury, that under the evidence in this case you must find that plaintiff's intestate was guilty of contributory negligence. (12) I charge you, gentlemen of the jury, that under the evidence in this case the plaintiff's intestate was guilty of contributory negligence, which was the proximate cause of the injury which is alleged to have caused his death, and the plaintiff cannot recover under the first count of the complaint." "(14) To constitute willful injury, there must be a design, purpose, or intent to do wrong and inflict the injury, and unless the evidence satisfies the mind of each individual member of the jury that the defendant's engineer, with design and purpose and intent to do wrong and inflict injury on some one on the train of the Louisville & Nashville Railroad Company, then you cannot find for the plaintiff on the fourth count of the complaint. (15) I charge you, gentlemen of the jury, that unless the evidence reasonably satisfies the minds of each individual member of the jury that the defendant, its agents, servants, or employees, ran its engine and cars across the crossing at which it is alleged the plaintiff's intestate was killed with the consciousness that the act of running said train across the crossing would probably result in injury to some person on the train of the Louisville & Nashville Railroad, then the plaintiff cannot recover. (16) I charge you that before you can find a verdict for the plaintiff under the fourth count of the complaint the evidence must reasonably satisfy the minds of each individual member of the jury that the defendant's engineer, Mosby, ran his train against the L. & N. train with the present abiding consciousness, and the willingness and design and intent to do wrong and inflict injury on some one on the train of the L. & N. Railroad Company. (17) Unless Bryan knew the way to be clear before he went upon the crossing, the plaintiff cannot recover, unless you believe from the evidence that Mosby, by using all the means at hand to avoid the collision, after discovering, or after he ought to have discovered, the peril, could not have avoided the collision.

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(18) Under the evidence and issues in this case there can be no recovery by the plaintiff based on the defendant's failure to have its engine provided with the usual headlight. (19) The usual and customary purpose of a headlight is to enable the engineer of the engine provided with the headlight to see the track ahead; and if you believe from the evidence that Engineer Mosby, by keeping a careful lookout ahead, by means of a proper headlight, would not have discovered any obstruction on the crossing, or the approaching engine on the other track, in time to have avoided the collision, you cannot find a verdict for the plaintiff on account of the absence of a headlight. (20) I charge you, gentlemen of the jury, that if you believe from the evidence that defendant's train was not equipped with a sufficient headlight, the fact that it did not have a sufficient headlight constituted only simple negligence, and would not entitle the plaintiff to recover in this suit. (21) The court charges the jury that it was the duty of plaintiff's intestate to know that the crossing was clear before he undertook to cross, and not to proceed until he knew the way was clear, and, if he failed in this duty, and was thereby injured, he was guilty of contributory negligence, and plaintiff cannot recover in this suit. (22) I charge you, gentlemen of the jury, that if you believe from the evidence that plaintiff's intestate stopped within 100 feet of the crossing he cannot recover under the fourth count of the complaint, if the evidence satisfies you that he failed to know that the way was clear before attempting to cross, and you further believe from the evidence that the defendant's engineer, Mosby, did not willfully and intentionally run his train against that upon which plaintiff's intestate was riding with a consciousness that he would likely injure some one on the train of the Louisville & Nashville." There were verdict and judgment in favor of the plaintiff, assessing his damages at \$15,000. From this judgment the defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Jas. Weatherby, for appellant.

Frank S. White & Sons, for appellee.

SHARPE, J. This action is to recover for an alleged wrong causing the death of plaintiff's intestate, Charles M. Bryan, which occurred in a collision between an engine attached to a train of the Louisville & Nashville Railroad Company on which Bryan was engineer and an engine attached to a train of the defendant company at a crossing of tracks operated by those companies respectively. In *Southern Railway Company v. Bryan*, 125 Ala. 297, 28 South. 445, there is a report of the case as it was presented on a former appeal. The last trial was had under the first count of the complaint, which charged that the death "was caused by the negligence of defendant's employees who were

operating defendant's said train in the running and management of said train," and the fourth count, which attributed the death to "wrongful, wanton, or intentional negligence of said employees in charge of defendant's said train in running said train forward and over said crossing without stopping before reaching said crossing." Issue was joined on pleas to the first count of the general issue and contributory negligence and on the general issue pleaded to the fourth count. There are assignments of error based on dispositions made of pleadings, which, not having been insisted on by argument, will be treated as waived. For the same reason a like course is taken with assignments of error numbered 7 and 12, and of so much of the assignments as related to refused charges 8 and 13.

An error which must work a reversal occurred in the admission, against defendant's objection, of evidence as to what one Everly testified on a former trial. Such evidence is admissible where a witness has left the state permanently, or for such indefinite time that his return is contingent or uncertain; but it is "admitted with great caution, only from necessity, and to prevent a failure of justice," and the necessity for it "ought to be shown clearly." *Harris v. State*, 73 Ala. 495; *Thompson v. State*, 106 Ala. 67, 17 South. 512. The evidence constituting the predicate for proof of what Everly had testified was the testimony of a witness wherein he said with reference to Everly: "I don't know exactly where he lives. I saw him about three or four months ago at Cullman, and asked what he was doing, and he said he was switching on some line in Texas. I know he is living in Texas." And this statement on cross-examination: "I know he is living in Texas, because he told me then he was living in Texas." This, with nothing else to show Everly's whereabouts, and nothing to show a search for or an effort to procure his attendance at court, falls short of fulfilling the measure of proof required to lay the predicate.

A similar question is raised on the admission of evidence as to what one Gifford testified on the former trial, but we pass it because improbable that the evidence as to his absence will be the same on another trial.

The testimony being in conflict as to whether the Louisville & Nashville train stopped within 100 feet of defendant's track before going upon the crossing, or ran at a rapid rate upon it without stopping, it was not improper to allow a witness who had testified about the speed of that train at the time of the collision to answer the question, "Was that or not about the usual rate of crossing another railroad after it had stopped?" The affirmative answer had some tendency to show the Louisville & Nashville train was not running rapidly, inasmuch as other evidence (notably the testimony of Lawrence) tended to show that rapid speed was not attainable within 100 feet after stopping. A witness shown

to have been experienced as a locomotive engineer, and who was being examined about the effect of a headlight such as was on the Louisville & Nashville engine, was allowed to answer this question: "Say the Southern train was coming down here, and that light thrown across there within one hundred feet of the crossing, how far could the engineer of the Southern see the light?" The question, being in hypothetical form, must naturally have been understood as calling for an opinion as to the distance such light was visible from one in the position of defendant's engineer, and was not objectionable as calling for a conclusion.

The following statements of defendant's witness Johnson, who was a brakeman on its train, were properly excluded, viz.: "I thought they would surely stop for the crossing." "Our engineer must have put on his air just about the time they struck us." "The position of the engines after the accident, and the appearances of the front of the L. & N. engine, clearly showed that they struck us, and struck us a very hard blow." The first of those statements was of a mere mental operation. The other two were conclusions, and not facts.

On the first appeal it was decided that from the evidence then before the court it appeared that plaintiff's intestate, Bryan, was negligent, in that he failed in the statutory duty of knowing, before attempting to cross defendant's track, that the crossing was clear. At the last trial the evidence on which that decision was based was substantially reproduced, but added thereto was the testimony of Lawrence, the fireman of the Louisville & Nashville engine, which tends to show not only that his engine was stopped within 100 feet of the crossing, but that thereafter, before proceeding, both he and Mr. Bryan made efforts to ascertain whether the crossing was clear, and that it was in fact clear at the time they proceeded to cross. This is inferable from the following testimony of this witness, together with other evidence showing the accident occurred at night, and that the Louisville & Nashville engine had a headlight, and that defendant's engine had none, except a small lantern fixed in the place usually filled by a headlight, and that defendant's train came from the right of Bryan as he faced the crossing: "We stopped long enough to look out and see if anything was coming. I was on the left side and Mr. Bryan was on the right; those being our proper places. Bryan asked me, 'How is everything on your side?' I said, 'Everything is all right; go ahead.' I could see the way clear about 100 or 150 yards. There was no train in there when we started across, and no light at all. There was a string of cars on the Southern track running at right angles to our track, 5 or 6 cars extending to within about 50 feet of the Mineral track we were going on. These cars were in front and to our right, were about 8 feet apart. I could see and did see Mr. Bryan look up on the right side

of the yard and across the crossing before he started across. After he stopped we made an investigation. He was looking when he started, and there was no train at all for 150 yards up on the Southern track to our right, and no light at all. There were no cars standing on that main line track where the collision occurred. No whistle blowed at all, except ours, and no bell rang except ours. The Southern didn't ring any bell or blow any whistle. The way was perfectly clear when we started across with our engine. We went across there at the rate of something like three miles an hour, because we stopped dead still, and a person in that distance could not go very fast, and it was such a dark, dreary night we were very careful."

By the statute (Code 1896, § 3441) it is provided with reference to engineers and conductors that, after stopping, and before proceeding to run a train over a railroad crossing, they must "know the way to be clear." This provision is to be construed as requiring knowledge not only that the crossing is free from immediate obstruction, but free from danger of such obstruction as ought reasonably to be expected. It does not, however, require knowledge "that the way will certainly remain clear against all after-occurring, extraordinary, unanticipated and unascertainable happenings." *Southern Railway Company v. Bryan*, *supra*. Touching further the conduct of Bryan, and also the conduct of those operating defendant's train, Lawrence testified: "When we started across, we gave two short blasts of the whistle; not very loud; a signal to go ahead, that could be heard two or three miles around the country. I rang the bell. Commence ringing way around in the woods, at that park place, before we got around. I was ringing the bell when we stopped and after we started; kept on ringing the bell. The next thing that happened to us was a stroke from the approaching engine that struck, it looked like to me, somewhere about the middle of the engine," etc. In view of Lawrence's testimony and the whole evidence, the question of whether the pleas of contributory negligence was sustained was proper for the jury's determination.

The question of defendant's liability *vel non*, whether considered under the first or fourth counts of the complaint, was likewise proper for determination by the jury, for the evidence gave room for inference that defendant's servants, when running its train to the crossing, were aware of the peril to which that action exposed those running the Louisville & Nashville engine in time to have stopped before striking. That being so, it was, for all that appears, open to the jury to further infer and to find either that the collision and death were due to a negligent failure on the part of defendant's servants to use preventative effort, or that they willfully, wantonly, or intentionally caused the same. *L. & N. R. Co. v. Brown*, 121 Ala. 222, 25 South. 609; *Central of Georgia*

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Railway Company *v.* Lamb, 124 Ala. 172, 26 South. 969; Louisville & Nashville R. Co. *v.* Markee, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21; Geo., Pac. R. Co. *v.* Lee, 92 Ala. 262, 9 South. 230.

It follows that the court was right in refusing the requested general affirmative charge, and those which expressly or impliedly negated a right to recover under the first count, viz., charges, 3, 4, 5, 9, 10, 11, 12, 18, and 20, and also that it was proper to refuse charges 2, 6, 7, and 21, each of which were inconsistent with any right to recover under the fourth count. Charge 14 is incomplete and obscure, and charge 17 is made bad by the occurrence therein of the word "not." Wantonness or willfulness short of intentional wrongdoing might have warranted a recovery under the fourth count, and therefore the refusal of charges 16 and 22 was proper. A headlight may be serviceable not only to the engineer using it, but as a warning to others of the train's approach. It was wrongly assumed in charge 19 that the absence of a headlight on defendant's engine would not afford ground for recovery if the use of one would not have disclosed an obstruction to the engineer. The part of the oral charge excepted to involved no reversible error.

Reversed and remanded.

NASHVILLE, C. & ST. L. RY. CO. *v.* HARRIS.

(Supreme Court of Alabama, Dec. 20, 1904.)

[37 So. Rep. 794.]

Child Injured on Track—Willfulness and Wantonness.

Evidence in an action for injury to a child on a railroad track by a train held insufficient to go to the jury on the question of willfulness or wantonness.

Same—Impeachment of Engineer.

Testimony of witness that the engineer, who testified in an action for injury to a child on a railroad track, had told him that when he first saw the child he thought it a goat, may be considered only for the purpose of impeaching the testimony of the engineer.

Same—Trespasser.*

A child, though so young as not to be chargeable with contributory negligence, who, after going onto a railroad track at a crossing, to cross over, turns, and proceeds up the track, becomes a trespasser, to whom the only duty of the railroad company is to use all reasonable means, after becoming aware of her presence and peril, to avoid injury.

Same—Failure to Give Signals—Train Seen by Child.

The negligent omission of the engineer to sound the crossing signal

*As to the care due trespassing children, see foot-note appended to Louisville & N. R. Co. *v.* Logsdon's Adm'r (Ky.), 12 R. R. R. 637, 35 Am. & Eng. R. Cas., N. S., 637; Monehan *v.* South Covington & C. St. Ry. Co. (Ky.), 12 R. R. R. 671, 35 Am. & Eng. R. Cas., N. S., 671; Kansas City, etc., R. Co. *v.* Matson (Kan.), 12 R. R. R. 675, 35 Am. & Eng. R. Cas., N. S., 675 (whether railroad was liable for injury to child shaken from wood pile, which the company knew was attractive to children, by passing train was a question for jury).

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cannot be held to have been the cause of a child coming onto the track at a crossing, so as to make the railroad company liable for injury to her, where, after she went on the track, and saw the train, she walked towards it, and then gazed at it from the middle of the track.

Appeal from Circuit Court, Marshall County; J. A. Bilbro, Judge.

Action by Annie Belle Harris, by next friend, George T. Harris, against the Nashville, Chattanooga & St. Louis Railway Company, for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed.

The evidence showed that the plaintiff, who was a little child 19 months old, was struck by an engine belonging to defendant at or near a railroad crossing. There were only two eyewitnesses to the accident, the engineer and the fireman. They testified that they saw the child when about 150 yards from the crossing; that she came on the crossing, and then proceeded up the track 10 or 12 feet towards the engine, and then stopped. The train was going about 18 miles an hour when the child was discovered and about 2 miles an hour when she was struck. There was evidence tending to show that the statutory requirement to ring the bell or blow the whistle at the crossing was not complied with. The engineer and fireman testified that as soon as the child was discovered the track was sanded, brakes applied, the engine reversed, and everything in their power done to stop the engine.

The first count of the complaint, as amended, sought to recover for the "wanton, reckless, or intentional negligence" of the engineer, "who, while operating, managing, and controlling said engine on said road with reckless, unwarranted, and dangerous speed, did wantonly and recklessly strike and run over plaintiff at a road crossing on said railroad." The second count, as amended, averred, in substance, that the plaintiff, who was a child of tender age, incapable of exercising judgment "for the purpose of crossing over or going beyond defendant's railroad at a public crossing," was struck and injured by the locomotive; the negligence complained of being the failure to ring the bell or blow the whistle at the crossing. The third count averred that the negligence consisted in the failure of the engineer to "use all means within his power, known to skillful engineers, to stop the train, after the discovery of the plaintiff upon the railroad"; the fourth, that the negligence consisted in "failure to keep a proper lookout on approaching the place where the plaintiff was injured"; the fifth, that it consisted in "the failure to have proper brakes and appliances for stopping the train." The sixth count is a rehearsal of the statements of negligence of the other counts, stating them in the alternative. Defendant demurred to first count on the ground that same "joined an action for simple negligence with an action for wanton neg-

ligence"; that it sought to recover punitive damages when it did not present a case of wanton, willful, or intentional negligence; and that it failed to show wherein the speed of the train was reckless. The defendant demurred to the other five counts on the ground that they did not show a cause of action, and because the complaint averred that plaintiff was a child incapable of exercising judgment and discretion, and further averred that said child entered upon the railway for the purpose of crossing said track. Defendant also filed separate demurrers to each count. The court overruled the defendant's demurrers, and issue was joined on plea of general issue and the statute of limitations of one year. Defendant requested affirmative charge as to each count, which was overruled by the court, except as to the fifth charge.

Oscar R. Hundley, for appellant.

McCord & McCord and J. A. Lusk, for appellee.

McCLELLAN, C. J. We deem it unnecessary to consider whether the first count of the complaint sufficiently charges willfulness, wantonness, or the like, since, assuming that it does, we are of opinion that no evidence was adduced on the trial tending to prove such charge. The only eyewitnesses to the occurrence were the fireman and the engineer. They each testified that, as soon as the child was seen by them, or either of them, approaching the track, the track was sanded, the brakes were applied, and the engine was reversed; that, in short, everything possible to be done to stop the train before it reached the point where the child came upon the track was promptly done. The speed of the train, considered with reference to the place of the accident, afforded no basis for an inference of willful, wanton, or reckless misconduct on the part of the engineer. Even if the declaration which the witness Hooper testified the engineer, Lane, made in his presence to the effect that he saw the little child when he was two or three hundred yards away from it, but thought it was a goat, be regarded as evidence in the case for any other purpose than the impeachment of the testimony of Lane given on the trial—which it is not (1 Greenleaf on Evidence, § 461f), it has no legitimate tendency to show that Lane willfully ran against the child, or acted wantonly toward it, or was recklessly indifferent to its safety. There was some evidence tending to show that the whistle was not sounded nor the bell rung as the engine approached the crossing, but this imported nothing beyond simple negligence on the part of the enginemen. Standing alone, it afforded no predicate for an inference of willfulness or wantonness on their part. The affirmative charge requested by the defendant against the first count should have been given.

All the evidence goes to show that the little child—a toddling baby 19 months old—came on the track at the crossing, and, seeing the train, turned up the track, and, after

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going several feet away from the crossing, stopped and stood looking at the approaching engine. Probably, so far as she was capable of intention, the child's purpose, when it came onto the track, was to cross over and beyond it along the road, and it was open to the jury to so find in line with the averment of the complaint in this connection. But her subsequent course made her a trespasser on defendant's track; none the less so by reason of her tender age, for, though she could not be charged with contributory negligence, she may be a trespasser upon the same facts that would impress that character upon a person of legal discretion, and, being a trespasser, the defendant, from the time she became one, owed her no duty other than to resort to all reasonable means to avoid injuring her after it (i. e., its servants) became aware of her presence and peril. The evidence without conflict showed that this duty was performed by the enginemen; that they did all that was possible to do to stop the engine before striking her.

There was a tendency of the evidence, as we have seen, to show that the statutory signals for the crossing were not given. If there was any room on the evidence for the jury to find that she would not have come upon the crossing had these signals been given, the injury might be ascribed to their negligent pretermission. The jury might have concluded that she was injured in consequence of the failure to give these signals, and found against the defendant on that ground, though satisfied that the trainmen were not at fault after she came on the track. But it is not our opinion that there was anything in the evidence to justify such conclusion. To the contrary, the evidence shows affirmatively that the child had not the least appreciation of the danger of going on the track, that her knowledge of the approach of the train, assuming even that she was capable of such knowledge, made no impression of danger whatever upon her (after seeing it, she walked towards it, and then stopped, gazing at it from a position in the middle of the track); and a finding that she would have heeded the warning of the crossing signals, had they been sounded, and kept off the track, is not only unwarranted by the evidence, but would be distinctly opposed to every manifestation the circumstances afforded. To say the least, such a conclusion would be pure speculation and conjecture unsupported by any evidence. Hence our further conclusion that the affirmative charge requested against those counts of the complaint which charged negligence on the part of the defendant's servants should have been given. The injury is not shown to have resulted from the only negligence of which there is any evidence.

We deem it unnecessary to discuss other rulings presented by the record.

Reversed and remanded.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

RICHMOND PASSENGER & POWER CO. *v.* ALLEN.

(Supreme Court of Appeals of Virginia, Feb. 2, 1905.)

[49 S. E. Rep. 656.]

Street Railway—Negligence—Collisions with Other Vehicles.*

A street railway company operating its railway upon a public street cannot run down a vehicle from behind, under any ordinary circumstances, without negligence or willful wrong.

Contributory Negligence—Driving Vehicle upon Street Car Tracks.†

It is not negligence to drive a vehicle, with curtains down on the sides and rear, upon the tracks of a street railway in a public street.

Harmless Error.

Where, upon the whole record, a different verdict could not have been found, the judgment will not be reversed because of error in giving or refusing instructions.

Error to Law and Equity Court of City of Richmond.

Action by Sally W. Allen against the Richmond Passenger & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

BUCHANAN, J. This action was brought by Mrs. Sally W. Allen against the Richmond Passenger & Power Company to recover damages for injuries resulting to her from the alleged negligence of the defendant company in running one of its cars upon the vehicle in which she was riding.

It appears that Mrs. Allen, a few minutes after 6 o'clock on the morning of the 5th of December, 1902, was driving a Dayton wagon, with side and rear curtains down, along Lester street, in the city of Richmond, in a westerly direction; that upon this street the defendant company was operating a

*As to the care required of those in charge of street cars to avoid collisions with other users of street, see foot-notes appended to *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 35 Am. & Eng. R. Cas., N. S., 91; *Anniston Elec. & Gas Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312; *Forrestal v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 11 R. R. R. 814, 34 Am. & Eng. R. Cas., N. S., 814; *Warner v. St. Louis & M. R. Co.* (Mo.), 11 R. R. R. 809, 34 Am. & Eng. R. Cas., N. S., 809; *North Chicago St. R. Co. v. Johnson* (Ill.), 11 R. R. R. 774, 34 Am. & Eng. R. Cas., N. S., 774; *South Covington & C. St. Ry. Co. v. McHugh* (Ky.), 11 R. R. R. 760, 34 Am. & Eng. R. Cas., N. S., 760; *Haas v. New Orleans Rys. Co.* (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442; *Coessens v. Rapid Ry. Co.* (Mich.), 11 R. R. R. 382, 34 Am. & Eng. R. Cas., N. S., 382; *Jett v. Central Elec. Ry. Co.* (Mo.), 11 R. R. R. 227, 34 Am. & Eng. R. Cas., N. S., 227; *Cameron v. Jersey City, H. & P. St. Ry. Co.* (N. J.), 11 R. R. R. 226, 34 Am. & Eng. R. Cas., N. S., 226; *Hayden v. Fair Haven & W. R. Co.* (Conn.), 10 R. R. R. 32, 33 Am. & Eng. R. Cas., N. S., 32 (mere use of car which overlaps sidewalk is not negligence).

†See foot-note appended to *Montgomery St. Ry. v. Hastings* (Ala.), 10 R. R. R. 2, 33 Am. & Eng. R. Cas., N. S., 2; *Rouse v. Detroit Elec. Ry.* (Mich.), 10 R. R. R. 58, 33 Am. & Eng. R. Cas., N. S., 58; foot-note appended to *Louisville Ry. Co. v. Colston* (Ky.), 12 R. R. R. 668, 35 Am. & Eng. R. Cas., N. S., 668; foot-note appended to *Mathiesen v. Omaha St. Ry. Co.* (Neb.), 11 R. R. R. 777, 34 Am. & Eng. R. Cas., N. S., 777.

double-track street car line, and that she was driving upon the track upon which it ran its west-bound cars; that she had been driving upon that track for several squares when one of the defendant company's cars ran into the rear of her wagon, tilting the wheels, and shoving the wagon upon the horse, causing him to run away, and resulting in the injuries complained of.

The plaintiff and her companion in the wagon both testify that they heard no bell, and had no warning of the approach of the car until their vehicle was struck. The motorman testifies that the gong was sounded, but when or where does not appear. He further states that he was running at a moderate rate of speed; that the morning was dark and cloudy, and his headlight was burning. He gives as a reason why he did not stop his car before running upon the wagon that there was a curve in the track, which threw the light away from the track, and not upon the wagon in front of him, so that he could not see the wagon; and that he did all he could to stop after he saw it. It clearly appears, however, from this motorman's own evidence, that it was sufficiently light for him to have seen the wagon without the aid of the headlight, for he testifies that he stopped as soon as he struck the wagon, and saw the horse, while it was running away, until the wagon struck an east-bound car a square or more distant and was turned over; all of which he thinks occurred in two minutes. From a map filed by the defendant, it seems the track was straight for several squares east of where the wagon was struck, and very slightly, if at all, curved at that point.

If the motorman did not see the plaintiff's wagon moving along in front of him, it was, under the facts and circumstances disclosed by his own evidence, because he was not keeping a proper lookout. Under the facts shown by the record the defendant company was clearly guilty of negligence in the management of its car.

A street car company operating its railway upon a public street cannot run down a vehicle from behind, under any ordinary circumstances, without negligence or willful wrong. *Vincent v. Norton & Taunton St. Ry. Co.*, 180 Mass. 104, 61 N. E. 822; *Richmond Traction Co. v. Clark*, 101 Va. 382, 386-388, 43 S. E. 618.

The plaintiff was not guilty of contributory negligence under the facts of this case. It is not negligence to drive a vehicle, with curtains down on sides and rear, upon the tracks of a street railway in a public street. The duty she owed the car coming up behind her was to get off the track when she knew of its approach. She did not know of it. If the gong was sounded, or any other warning given, neither she nor her companion heard it. They were not bound to keep an impossible watch to the rear to avoid an injury which, under any ordinary circumstances, could only result

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from culpable negligence or willful wrong on the part of the defendant company. *Vincent v. Norton & Taunton St. Ry. Co.*, supra; *R. & P. Ry. Co. v. Rubin*, 102 Va. 809, 47 S. E. 834; *Richmond Traction Co. v. Clark*, supra.

Upon the whole record a different verdict could not have been rightly found. It is therefore unnecessary to examine the propriety of the rulings of the court in giving and refusing instructions, since a decision of that question could not affect the result. *Southern Ry. Co. v. Oliver*, 102 Va. 710, 47 S. E. 862; *Moore v. B. & O. Ry. Co.*, 103 Va. —, 48 S. E. 887, and cases cited.

The judgment complained of is plainly right, and must be affirmed.

CHICAGO CITY RY. CO. *v.* SAXBY.

(Supreme Court of Illinois, Dec. 22, 1904.)

[72 N. E. Rep. 755.]

Personal Injuries—Plaintiff's Duty to Employ Physician—Effect of Mistreatment by Physician.*

A person injured by the negligence of another is bound to use reasonable care to effect a speedy cure, and must exercise reasonable care to employ physicians of ordinary skill, but such person is not an insurer of the skill of the physicians employed, or required to employ the highest medical skill available; and the fact that the physicians employed make a mistake in the treatment and thereby fail to effect a cure, does not preclude the person injured from recovering for the entire injury sustained, so long as the requisite care has been used in the employment of a physician.

Same—Inherent Tendency to Disease—Question for Jury.

The question whether or not injuries were the result of defendant's negligence, or of an inherent disease, or tendency to disease, in plaintiff, is a question of fact.

Same—Same—Mistreatment by Physician.

The fact that injuries caused through the negligence of another were aggravated by an organic tendency to disease existing in the person injured, which was developed by the injury, or the treatment applied to the inquiry by the physicians, does not preclude a recovery for the injuries.

Harmless Error.

In an action for injuries, where plaintiff had fully testified as to the circumstances of the accident, the refusal of the court to strike out an answer in which she stated that she was upset in every particular, and thought every function of her body was out of order from the shock, was not reversible error.

Personal Injuries—Medical Testimony—Development of Organic Disease.

In an action for injuries, the evidence showed that plaintiff was thrown to the ground, and struck upon her left side; that prior to the injuries she was in good health; and that she sustained an injury to the hip, which subsequently involved the knee. A physician testified

*As to the liability of railroad companies for the negligence of physicians and others in charge of sick or injured persons, see foot-note appended to *Missouri, etc., Ry. Co. v. Freeman* (Tex.), 13 R. R. 598, 36 Am. & Eng. R. Cas., N. S., 598.

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that the night of the injury he discovered visible evidence of trouble with the knee, and further stated that the knee was very painful from the time of the injury: *held*, that there was sufficient evidence that the knee was injured at the time of the accident to permit evidence that tuberculosis, which developed in the knee, might be occasioned by violence.

Appeal from Appellate Court, First District.

Action by Mary Saxby against the Chicago City Railway Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

This was an action on the case brought by the appellee in the circuit court of Cook county against the appellant to recover damages for an injury to her person claimed to have been sustained by her in consequence of the car of appellant, upon which she was a passenger, being suddenly started as she was about to leave the car, and before she had time to alight upon the street, whereby she was thrown down and injured. The jury returned a verdict in her favor for \$16,000, and, upon her remitting \$6,000 of that amount, the court overruled a motion for a new trial and entered judgment upon the verdict for \$10,000, which judgment has been affirmed upon appeal by the Appellate Court for the First District, and a further appeal has been prosecuted to this court. Two reasons are urged in this court as grounds for reversal: First, that the verdict is not justified by the evidence; second, the court admitted improper evidence on behalf of the appellee.

Wm. J. Hymes and Watson J. Ferry (Mason B. Starring, of counsel), for appellant.

Brode B. Davis and Walker & Williams, for appellee.

HAND, J. (after stating the facts). At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant requested the court to instruct the jury to return a verdict in its favor, which the court declined to do, and the action of the court in that regard has been assigned as error.

On the evening of August 16, 1899, appellee was a passenger upon one of appellant's cars going south upon Indiana avenue, in the city of Chicago. The evidence introduced on her behalf tended to show: That as the car approached Forty-Fifth street she signaled the conductor to stop the car at that street. That the car stopped at the intersection of Indiana avenue and Forty-Fifth street. That she started to leave the car, but, before she had time to alight upon the ground, and while she stood upon the running board upon the west side of the car, the car was suddenly started without warning to her, and she was violently thrown from the car upon the street, where she struck upon her left side and was injured. At the time of the accident the appellee was 60 years of age,

and was in good health. From the time of the injury to the date of the trial, which occurred more than two years after the accident, she had left her room but once, and at the time of the trial was unable to sit up but a portion of the time or to walk. That the injury was to her left leg. That the neck of the femur bone of that leg was fractured, and tuberculosis had developed in the left knee, and the knee joint of that leg had become ankylosed.

The main contention of the appellant is that the diseased condition of the knee was caused by the leg being improperly treated by the physicians employed by the appellee, by placing thereon splints and plaster casts, and attaching to the foot pulleys and weights, and that tuberculosis, which, it is claimed, was organic with her, by reason of such imperfect treatment was developed in the knee; and it is urged that by reason of those facts the diseased condition of the knee was not the natural and ordinary consequence of the injury received by appellee at the time she fell upon the street, and that she ought not to be permitted to recover damages from the appellant for the conditions which were shown to exist in the knee. The appellee, immediately after the injury, was carried to her apartment, and was treated by Drs. Freund and Farnum, and Drs. Fenger and Andrews were called in consultation—Dr. Freund was called within a few minutes after the accident—all of whom were physicians practicing their profession in the city of Chicago. She was also cared for by a trained nurse during the first 18 months succeeding her injury, and at the time of the trial had in her employ a young woman who had devoted her entire time to her care since the trained nurse left her employ. Drs. Hallstead and Findley, also physicians in practice in the city of Chicago, were called as experts, and approved the treatment applied to the appellee by her attending physicians.

It was the duty of the appellee to use reasonable care to effect a speedy and complete cure of the injury which she sustained by being thrown upon the street from appellant's car, and, to that end, she was required to exercise reasonable care to employ physicians of ordinary skill and experience to treat her, and other means to effect a cure of her injuries. She was not, however, required to employ the highest medical skill which might be found. All the law required was that she exercise such prudence as men and women of ordinary judgment, under like circumstances, would exercise in the choice of physicians and the means to be used to effect a recovery. She was not an insurer, bound to act at her peril; and if she exercised reasonable care in selecting her physicians, and in the employ of other means for her recovery, if her physicians made a mistake in the treatment applied by them to her, or the means employed failed to effect a cure, then she may recover for the entire injury which she has sustained, as the law, if the injured person uses ordi-

nary care in selecting a physician, and in the employment of other means to effect a cure, regards an injury resulting from the mistake of a physician, or from a failure of the means employed to effect a cure, as a part of the immediate and direct damages which naturally flow from the injury.

In *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601, which was a personal injury case, the court permitted the plaintiff to prove that the bones of his arm which were broken had not healed, but that the same had formed a false joint. On page 25, 109 Ill., 50 Am. Rep. 601, the court said: "If appellee exercised ordinary care to keep the parts together, and used ordinary care in the selection of surgeons and doctors, and nurses, if needed, and employed those of ordinary skill and care in their profession, and still, by some unskillful or negligent act of such nurses or doctors or surgeons, the parts became separated, and the false joint was the result, appellant, if responsible for the breaking of the arm, ought to answer for the injury in the false joint. The appellee, when injured, was bound by law to use ordinary care to render the injury no greater than necessary. It was therefore his duty to employ such surgeons and nurses as ordinary prudence in his situation required, and to use ordinary judgment and care in doing so, and to select only such as were of at least ordinary skill and care in their profession. But the law does not make him an insurer, in such case, that such surgeons or doctors or nurses will be guilty of no negligence, error in judgment, or want of care. The liability to mistakes in curing is incident to a broken arm, and where such mistakes occur (the injured party using ordinary care) the injury resulting from such mistakes is properly regarded as part of the immediate and direct damages resulting from the breaking of the arm." In *Collins v. City of Council Bluffs*, 32 Iowa, 324, 7 Am. Rep. 200, the court instructed the jury that if in the selection of a physician, and in the use of other means for effecting a cure, the plaintiff used reasonable and ordinary care, her damages should not be diminished, notwithstanding her suffering might have been alleviated and her condition improved. The court, in discussing this instruction, said (page 329, 32 Iowa, 7 Am. Rep. 200): "This instruction unquestionably announces a correct rule. All that the law required of plaintiff was the exercise of her judgment and the care which men of ordinary prudence, under like circumstances, would exercise in the choice of physicians and the means to be used to effect her recovery. She was not required to employ the best surgical skill and the means best adapted to heal her injuries. These may not have been within her reach; and while she may have possessed prudence, and reason, even, in the highest degree possessed by men who are unlearned in medicine and surgery, she still may have been unable to choose the best means for her recovery. But she was required to exercise only the judg-

ment and care which men and women in her condition are ordinarily capable of exercising. This is the purpose of the instruction."

The evidence fails to establish with any degree of certainty that the appellee had in her system an organic tendency to tuberculosis—at least, at the time of the injury it was not developed in any form, and prior to the injury her left knee was in a healthy condition; and at least two of the physicians called by her stated, in reply to hypothetical questions submitted to them, that, in their opinion, the conditions found in her left knee were due to an external injury, and the appellee testified (and she was corroborated by Dr. Freund) that her left leg was swollen and painful from the time of the injury. If, however, it be conceded that she had tuberculosis in her system, and that the same was developed in the knee by reason of the injury thereto, or from the treatment she received in the endeavors made to effect a cure of the fracture of the neck of the femur, we think it cannot be said that the diseased condition of the knee was not a consequence which naturally and ordinarily might not follow as a result of the injury of appellee caused by the negligent act of appellant.

In *Stewart v. City of Ripon*, 38 Wis. 584, an action was brought to recover damages alleged to have been sustained by the plaintiff from a fall upon a defective sidewalk. The contention was made on behalf of the city that the diseased condition of the arm of the plaintiff was due to the fact that he had in his system an organic tendency to scrofula, and that such tendency was the proximate cause of the necrosis of the bone of his arm, and not the injury which he sustained by falling upon the sidewalk. The court held that, although the diseased condition of plaintiff's arm might not have occurred but for his organic tendency to scrofula, still, if the disease was developed by the injury, and a cure was retarded or prevented by reason of the presence of scrofula in the plaintiff's system, the defendant's negligence was the proximate cause of the whole injury. And in *Baltimore City Railway Co. v. Kemp*, 61 Md. 74, it was said: "It is the common observation of all that the effect of personal physical injuries depends much upon the peculiar conditions and tendencies of the person injured, and what may produce but slight and uninjurious consequences in one case may produce consequences of the most serious and distressing character in another; and, this being so, a wrongdoer is not permitted to relieve himself from responsibility for the consequences of his act by showing that the injury would have been of less severity if it had been inflicted upon any one else of a large majority of the human family."

Mr. Thompson, in his *Commentaries on the Law of Negligence* (volume 1, § 150, p. 145), says: "The duty of care and of abstaining from injuring another applies to the sick, the

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weak, and the infirm, as well as to the strong and healthy. When this duty is violated, the measure of damages is the injury which results, though this injury may not have followed but for the peculiar physical condition of the person injured, although it may have been thereby aggravated." In section 151 of the same work (page 147) it is said: "It may be stated generally that if the negligence of A. produces a hurt to B., which aggravates a pre-existing tendency to disease in B., the negligence, and not the disease, is deemed, in law, the proximate cause of the injury."

The author of the article on "Contributory Negligence" in the American & English Encyclopædia of Law (volume 7 [2d Ed.] p. 388), says: "In cases where the defendant's negligence caused a disease, developed a latent tendency to disease, aggravated a prior disease, or led in immediate sequence to disease, the defendant must respond in damages for such part of the diseased condition as his negligence caused; and if there can be no apportionment, or if it cannot be said that the disease would have existed apart from the injury inflicted by the defendant, then the defendant is responsible for the diseased condition."

The court instructed the jury upon behalf of the defendant: "The jury are instructed that, even though the defendant were liable for the accident in question, still you are instructed that she could not recover in this case for any damage which was not the natural and necessary result of the accident and injury then sustained, if you find from the evidence she sustained injury at the time of the accident; and if you find from the evidence that the plaintiff has now, or has had, any other disability resulting from conditions which existed in the plaintiff prior to said accident, and of which the accident in question was not the proximate cause, then you are not permitted by law to allow her anything for such disability, and should not do so from motives of sympathy or any other motive." The question was therefore submitted to the jury whether the injuries from which the appellee was suffering were the results of the diseased condition of her system, which existed prior to her injury, or were the direct and immediate result of the appellee being thrown from the car upon the ground by the negligent act of the appellant; and they were told, if her injuries were the result of disabilities with which she had been afflicted prior to the injury, she could not recover damages by reason of such disabilities. The question whether or not the injuries of the appellee were the result of the negligence of the appellant, or resulted from disease, or a tendency to disease, was a question of fact; and, as there was evidence in the record which fairly tended to show that the injuries from which the appellee was suffering were the result of her being thrown from the appellant's car, we are of the opinion the trial court did not err in declining to take

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ment and care which men ordinarily capable of execution." instruction."

The evidence fails to show that the appellee had tuberculosis—at least developed in any form in a healthy condition called by her statement submitted to them in her left knee. The appellee testified that her left knee was injured by the fall from the car, and the effect of the fall; and, while the statement was in a certain sense the expression of an opinion, it was in a broader sense the statement of a fact—that in any event, in the opinion of the court, the refusal to strike out the answer should not cause a reversal of the case.

While Dr. Davis, who had treated the appellee, was upon the stand, he was asked, "What is the fact, doctor, as to tuberculosis being occasioned by trauma or violence?" to which he replied: "Tuberculosis may be caused to center at the point of trauma. A great many instances are known where it occurs." It is urged there was no evidence upon which to base the question, as the evidence failed to show the left knee of appellee was injured at the time of the accident. The evidence showed the appellee was thrown from the car and struck upon the ground upon her left side, that prior to her injury she was in good health, and that she sustained an injury to the hip which subsequently involved the knee. While upon the stand she testified: "I suffered excruciating pain all the time in my hip and in my back—in my hip principally, but my limb was swollen and painful." Dr. Freund also stated: "The first time I discovered any visible evidence of anything the matter with the knee was the same night of the injury." He also stated: "During the period described the knee was always very painful—from the time of the injury." While he qualified this statement upon cross-examination, we think it cannot be said that there is no evidence that the knee was injured at the time of the accident. The court did not err in permitting the question to be answered.

We do not deem it necessary to take up separately and consider all of the objections to the court's ruling upon the evidence which have been raised and discussed in the briefs. Suffice it to say that they are technical in the extreme, and,

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and no perceptible effect upon the verdict, judicial to the appellant. Finding no error on this record, the judgment of the Appellate Court is affirmed.

ent affirmed.

LAMBERT v. SOUTHERN PAC. R. CO.
(Supreme Court of California, Feb. 7, 1905.)

[79 Pac. Rep. 873.]

Accident at Crossing—Contributory Negligence.*

In an action against a railroad for injuries from a collision at a crossing, evidence *held* to show plaintiff guilty of contributory negligence as a matter of law.

Same—Signals—Knowledge of Approach of Train.†

Where plaintiff, who was injured at a railroad crossing, actually knew of the approach of the train when he was 450 feet from the crossing, failure of the engineer to sound the whistle or ring the bell had no causal connection with the ensuing collision.

Same—Right to Presume That Person Will Avoid Danger.‡

Where those in charge of a locomotive saw plaintiff's team slowly approaching a crossing 150 feet away, they were not chargeable with negligence in failing to check the train, but were entitled to presume plaintiff would stop.

Department 2. Appeal from Superior Court, Santa Barbara County; W. S. Day, Judge.

Action by Henry Lambert against the Southern Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Canfield & Starbuck, for appellant.

B. F. Thomas, for respondent.

HENSHAW, J. This action was for damages. Plaintiff alleged that as he, with his wagon and two horses, was traveling on the public highway, at a point upon this highway in the town of Summerland where it crosses the defendant's railroad, the defendant negligently, carelessly, and wrongfully ran a locomotive onto plaintiff's horses and wagon, and the plaintiff, killing the horses, breaking the wagon, and injuring plaintiff himself. The defense pleaded both a general denial and contributory negligence. At the close of plaintiff's evidence, and again at the close of all the evidence, defendant

*As to whether there can be a recovery for injuries sustained in an attempt to cross railroad tracks in front of a train which is seen by the traveler to be approaching before he makes the attempt, see foot-note appended to Roenfeldt v. St. Louis & S. Ry. Co. (Mo.), 13 R. R. R. 470, 36 Am. & Eng. R. Cas., N. S., 470, where all the preceding authorities in this series are collected.

†See foot-notes appended to Louisville Ry. Co. v. Colston (Ky.), 12 R. R. R. 668, 35 Am. & Eng. R. Cas., N. S., 668.

‡See foot-note appended to Simpson v. Rhode Island Co. (R. I.), 12 R. R. R. 642, 35 Am. & Eng. R. Cas., N. S., 642.

moved for the dismissal of the action, or for a judgment of nonsuit, which motions were denied. From the judgment which was rendered upon the verdict of the jury in favor of plaintiff, defendant appeals, and with its appeal presents a bill of exceptions.

The evidence is insufficient to sustain the verdict and judgment, and defendant's motion should have been granted. As might be expected, the strongest testimony for the plaintiff is that given by himself, and from this it appears that at the time of the trial he was a farmer 67 years old, so deaf that he could not hear ordinary conversation, and his testimony was given by question and answer in writing. He had resided about a mile and a half from the town of Summerland for about 30 years. He had driven horses all his life, and at one time was a stage driver. One of his horses he had driven over this road daily for about 14 years. The other horse he had had a few months, and had driven him over the road in a buggy, but not very often. Neither had ever been frightened at the cars, and both had been near the cars. From the town of Summerland the railroad track and the main county road approached each other as one goes eastward at an acute angle, until, at a distance of about 700 feet from the post office, the highway crosses the railroad. The obstructions to the view of one traveling upon the highway are insignificant, the depot itself being the greatest of them, and one driving toward the crossing can, looking westward, easily see the track for from one quarter to one-half a mile. To the left of the highway, and upon the side away from the track, at a point about opposite the crossing, is a road, and to the east of this road, and still opposite the crossing, the grade is such as easily to have permitted one to drive upon it, and thus avoid crossing the track. Upon the day of the accident plaintiff had stopped at the post office to secure his mail. He left the post office and started slowly toward the railroad. While driving along he was "glancing at the head lines of his newspaper * * * for a little way—for about 25 or 30 yards perhaps." When he had thus driven about 50 or 60 yards, "all of a sudden my horses became frightened and started off. I thought it was the cars, and I tried to hold them, which I was unable to do. When I had gone about 100 yards, I looked to see where the cars were. I saw them over my right shoulder. I saw the engine; didn't see the string of cars; just saw the engine. I was within about 30 or 35 yards of the crossing. I pulled on the horses with all the strength I had, but I couldn't hold them. They were soon on the track. There was no place where I could turn off—oil derricks to one side. When the engine came near to them, my horses started off on a trot. They continued to trot until the collision with the engine. The horses became frightened about 150 yards from the crossing as near as I could tell. I didn't hear no whistle or no bell. When I saw

the engine, the bell was hanging still. I think I could have heard the bell if it had rung or the whistle if it had been sounded within 80 rods of the crossing. I have heard the whistle and heard the bell lots of times when I have been riding through Summerland before the accident. I could have heard the whistle or bell anywheres between the depot and the crossing." It appears from numerous eyewitnesses to the accident that the horses were "just trotting along" at a rate of from 4 to 6 miles per hour, while the speed of the train was about 20 miles an hour.

From plaintiff's own testimony, then, it appears that he became aware of the approach of the train when he was some 150 yards distant from the crossing, and that his horses proceeded to trot toward the crossing, and that he could not stop them. It further appears that he thus had 450 feet of distance to travel, with places and opportunity to have turned to the left, and thus to have avoided the accident. The only reason he could assign for not doing so is the presence of oil derricks; but it is made clearly to appear, as has been said, that there was a traveled street into which he could have turned, and that the condition of the land to the left of the highway was such that he could easily and with safety have driven his horses upon it. Besides the testimony of the plaintiff, there were three eyewitnesses to the accident called by him—Mr. Dewlaney, Mr. Hickey, and Mrs. Gibson. Mr. Dewlaney saw the plaintiff first when the latter was going east and was about 500 feet west of the crossing. Plaintiff's horses were "trotting along," and it did not occur to Mr. Dewlaney that there was any likelihood of the accident until the plaintiff had gone about 350 feet further, and was within 150 feet of the crossing; that knowing that the engine was approaching, and knowing that the plaintiff was deaf, and not having seen him look around, Mr. Dewlaney stood up, saying: "There is a man who is likely to get run into." He then watched the plaintiff from that time until the collision. The plaintiff did not change the speed at which his horses were still trotting along, "a slow gait of about five or six miles an hour," and there was nothing to indicate to Mr. Dewlaney that there was any likelihood of an accident besides the two facts that he knew the plaintiff was deaf and did not see him look around up to the time when the collision took place. When quite near the track the horses apparently became frightened, but, if the plaintiff had looked around, he would have seen the train, and would have had time to stop after Mr. Dewlaney had stood up and said the plaintiff was likely to get run into. Mr. Hickey, who was with Mr. Dewlaney, stood up and looked when Mr. Dewlaney made the remark that "there is a man who was likely to get run into," and saw the plaintiff when the latter was at a distance of about 150 feet from the crossing. He was driving along the road, at the rate of 5 or 6 miles an hour, and his

horses were trotting. The train was making a good deal of noise, but Mr. Hickey, as well as Mr. Dewlaney, knew that the plaintiff was deaf, and plaintiff appeared to Mr. Hickey not to know that the train was approaching. Mrs. Gibson was picking flowers with her grandchild when she heard the rumble of the train. She looked up and was startled to see the plaintiff and the engine close together, just passing east of her. The collision took place almost immediately. Although she did not estimate the rate of speed of the plaintiff's horses, and could not say whether she could have seen any attempt on his part to stop them after he had passed by, she observed, as the plaintiff passed her, that the horses were "trotting along at an ordinary rate"—not running away, but "just trotting along as horses will," and that "they did not show any signs of fright or increase their speed materially as the engine came near." Nor did she see the plaintiff make any attempt to stop them. There was nothing to prevent the plaintiff from seeing a quarter of a mile westerly up the track, or from seeing the engine, which was so close when Mrs. Gibson looked up that she saw at once that the accident was inevitable, if he did not "cross the track before the engine could catch him." If, therefore, we are to accept plaintiff's testimony alone, then it appears that for 450 feet before reaching the crossing he knew that the train was approaching, and that he did not turn his horses, which were trotting at a speed of only 5 or 6 miles an hour, aside to a place of safety, as he could easily have done. If we are, however, to take the testimony of his own witnesses, then, himself a very deaf man, he deliberately drove his team upon the crossing, without looking to see whether or not a train was approaching, at a slow pace, in broad daylight, when the track was visible to him for more than a quarter of a mile. That such conduct constitutes contributory negligence, as a matter of law, is settled beyond peradventure. *Fleming v. W. P. R. R. Co.*, 49 Cal. 253; *Glascock v. C. P. R. R. Co.*, 73 Cal. 137, 14 Pac. 518; *Hager v. S. P. Co.*, 98 Cal. 309, 33 Pac. 119; *Herbert v. S. P. Co.*, 121 Cal. 227, 53 Pac. 651; *Green v. S. P. Co.*, 132 Cal. 254, 64 Pac. 255.

There is much testimony in the case to the effect that the bell was rung and the whistle blown; but, putting that aside and assuming that such was not the fact, yet as the only purpose was to give warning, and as plaintiff by his own testimony knew of the approach of the train when he was 450 feet from the crossing, the negligence of the defendant—if such there was—in failing to sound the bell or whistle, has no causal connection with the accident itself. *Puckhaber v. Southern Pacific Co.*, 132 Cal. 363, 64 Pac. 480. So, too, as to the failure of the engineer to stop the train. The fireman testifies that he first saw the plaintiff when the plaintiff was about 150 feet and the engine about three times that distance from the crossing; that plaintiff was driving along at an ordi-

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nary rate of speed, about 4 miles an hour. The horses were trotting, and did not show any signs of fright, and the fireman had no idea that plaintiff was going to try and cross the track until the plaintiff was about 10 feet from the main track. As soon as he realized that plaintiff was endeavoring to cross the track, the fireman called to the engineer, and every effort was made to avoid the collision. Under this state of the evidence, there can, of course, be no effort to invoke the doctrine termed the "last chance doctrine," to the effect that in cases of contributory negligence he who has the last clear opportunity to avoid inflicting an injury is responsible, if in the exercise of ordinary care he fails to do so; for there was nothing in the approach of the plaintiff, according to the testimony of the fireman and of plaintiff's witnesses, to call for the stopping of the train. The fireman did not know that the plaintiff was deaf, and was not bound to assume that the driver of a team so approaching a crossing in broad daylight, with an unobstructed view—the team merely trotting along—would not check his horses in a place of safety.

For these reasons the judgment appealed from is reversed. We concur: LORIGAN, J.; McFARLAND, J.

GIARDINA v. ST. LOUIS & M. R. RY. CO.

(Supreme Court of Missouri, Division No. 1, Dec. 22, 1904.)

[84 S. W. Rep. 928.]

Street Railroads—Injury to Persons on Track—Contributory Negligence.*

A person who is familiar with the operation of street cars, and who, after stopping at the rear of a standing car to listen for approaching cars on another track, and, not hearing one, steps on the track in front of an approaching car without looking, is guilty of such negligence as will prevent his recovery, though the approaching car is running at a high rate of speed over the crossing without sounding the gong.

Appeal from Circuit Court, St. Louis County; J. W. McElhinney, Judge.

Action for personal injuries by Jake Giardina against the St. Louis & Meramec River Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

*As to whether a person must stop, look and listen before crossing street railway tracks, see foot-note appended to *Portsmouth St. R. Co. v. Peed's Adm'r* (Va.), 13 R. R. R. 65, 36 Am. & Eng. R. Cas., N. S., 65; foot-note appended to *Itzkowitz v. Boston Elevated Ry. Co.* (Mass.), 12 R. R. R. 583, 35 Am. & Eng. R. Cas., N. S., 583.

Contributory negligence as affected by failure to give crossing signals, see foot-notes appended to *West v. Northern Pac. Ry. Co.* (N. Dak.), 12 R. R. R. 655, 35 Am. & Eng. R. Cas., N. S., 655.

As to the care required of a highway traveler at a railroad crossing where the view is obstructed, see foot-note appended to *Confer v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 429, 36 Am. & Eng. R. Cas., N. S., 429; *Chicago, etc., Ry. Co. v. Andrews* (C. C. A.), 12 R. R. R. 584, 35 Am. & Eng. R. Cas., N. S., 584.

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Lee Meriwether and A. E. Hausman, for appellant.

Jefferson Chandler and J. Lionberger Davis, for respondent.

VALLIANT, J. Plaintiff received personal injuries by coming in collision with a street car on defendant's railroad in St. Louis, and brings this suit to recover damages, alleging that the accident was the result of the defendant's negligence. At the close of the plaintiff's evidence the court gave the jury a peremptory instruction to find for the defendant, and the jury rendered a verdict in accordance with the instruction. From the judgment on that verdict the plaintiff appeals.

The evidence for the plaintiff tended to prove as follows: Manchester avenue runs east and west, Barron avenue crosses it running north and south. Defendant owns a double-track street railroad in Manchester avenue. The south track is for the east-bound cars and the north track for the cars west-bound. The distance between the south rail of the north track and the north rail of the south track is 6 feet 10 inches. On the occasion with which we are now concerned a car going east on the south track had crossed Barron avenue, and stopped to receive passengers, with its rear end at the east line of Barron avenue. Plaintiff came running, to give his brother, who was just boarding that car, a key. He ran south in Barron avenue, crossed the north track of the railroad, and came to the rear end of the car that had stopped, as above mentioned, and handed his brother, who was by that time on the rear platform, the key. Then he turned to go back on the way he came, stepped on or near the north track, and was struck by a west-bound car on that track, and received severe injuries. When the car struck plaintiff it dragged him 100 feet, then ran 100 feet farther before it stopped. At the moment the car struck plaintiff, it was going as fast as it usually goes in the middle of a block. There was no gong sounded or other signal of its approach.

The printed rules of the company were in evidence, and showed that it was the duty of the motorman to sound the gong when within 100 feet of the crossing, and repeat it once or twice on approaching, nearing the crossing; also to sound the gong at 50 feet before meeting another car and while passing it. When passing a car that is stopped, the motorman is required to slow up, have his car under control, and sound his gong freely. Plaintiff testified that he had noticed that it was a custom of the company, in the operation of its cars, to have the motorman of a car which was approaching a car that had stopped to sound his gong and go slow, and, knowing this custom, he, before attempting to cross the north track, paused behind the east-bound car, and listened, but, hearing no gong, concluded that no car was coming west, stepped out, and was struck. The tracks, looking east from where the plaintiff stood, were straight for 1,000 feet, and

the car coming west could have been seen from that distance if one had been looking. It may be conceded that the defendant was negligent in running its car at a high rate of speed, and without sounding the gong, past a standing car, from the rear of which the motorman ought to have known that people were liable to pass. It is not likely that the peremptory instruction was given on the theory that no negligence of the defendant was shown, but rather that the plaintiff failed to observe that degree of care that was to be expected of a man of ordinary prudence, and that his negligence contributed with the negligence of the defendant to produce the injury complained of. Plaintiff was familiar with the location, and also with the movements of the cars. He had even taken such notice of the operation of the cars that he was aware that it was the custom for a running car, passing one that had stopped, to be checked in its speed, and its gong sounded freely. He was so confident of this custom that he seemingly on this occasion staked his life on its observance, for, after pausing to listen for the sound of the gong, and hearing none, he stepped on the north track, or in front of the coming car, without looking, and was struck. From where he stood, the body of the east-bound car shut off his view to the east, but one who was as familiar with the movements of the cars as he said he was—in fact, any man of common experience in the plaintiff's place—should have known that in a moment the east-bound car would have gone, and the obstruction to his vision would have been removed. But, even if he had not had that moment to spare, he could have leaned forward beyond the line of the standing car in perfect safety, and have seen the west-bound car coming. The measured distance between the tracks was six feet ten inches. One witness for plaintiff said that the distance between two cars passing on those tracks was about one foot, but he also said that the distance between the tracks was about four feet. He had made no measurement for either estimate. He was short two feet and ten inches in his estimate as to the distance between the tracks. But, even if the space between the passing cars was only one foot, it was sufficient to enable the plaintiff to have looked, and, if he had looked, he would have seen the car coming, and would not have been hurt. His act in stepping on or near the north track without looking for the west-bound car was negligence, and it contributed to cause the accident. If authorities are needed to sustain this view of the law, they may be found in the cases cited in the brief for respondent, and the cases cited in the brief for appellant are not to the contrary. The court did right to direct a verdict for the defendant on the plaintiff's evidence.

The judgment is affirmed. All concur, except ROBINSON, J., absent.

GOLDMANN v. MILWAUKEE ELECTRIC RY. & LIGHT CO.

(Supreme Court of Wisconsin, Nov. 15, 1904.)

[101 N. W. Rep. 384.]

Crossings—Care Required of Highway Traveler.*

Due care in approaching a street railway crossing can be satisfied only by the full use of the senses of sight and hearing at the last moment of opportunity before passing the line between safety and peril, and it is only when deprived in some degree of the opportunity to observe that one may rely on his judgment as to chances in driving across the tracks.

Street Railways—Right of Way.

No right of way exists in favor of one crossing the tracks of a street railway when a diminution of the speed of the car is necessary to enable him to pass in safety.

Accident at Crossing—Contributory Negligence.

Plaintiff was driving south, and came to a cross-street on which the defendant street railroad company had double tracks. As he reached a point where he was substantially on the north crosswalk of the street, and his horse's head some 15 feet north of the track, he stopped, and looked west, and saw no car; then looked east, and saw one about a block (389 feet) away, coming towards him very slowly. He started his horse at a speed of about two miles an hour to cross the street without again looking for a car. When his horse was on the track, and the front wheels close to the north track, his little daughter cried out to look out for the car. He then looked, and saw it about half a block away, coming very rapidly. He urged his horse to greater speed, reaching a velocity of about three miles an hour, but before getting across was struck and injured: *held*, that plaintiff was guilty of contributory negligence precluding recovery.

Appeal from Circuit Court, Milwaukee County; Orren T. Williams, Judge.

Action by A. A. Goldmann against the Milwaukee Electric Railway & Light Company. From a judgment for plaintiff, defendant appeals. Reversed.

The plaintiff, according to his own statement, was driving south on Sixth street, in Milwaukee, when he came to State street, on which were double tracks of the defendant's railway. As he reached a point where he was substantially on the north cross walk, and his horse's head some 15 feet north of the north railroad track, he stopped, and looked west, and saw no car; then looked east, and saw one about a block (389 feet) away, coming towards him very slowly. He started his horse at a speed of about two miles an hour to cross State street, without again looking for a car. When he had progressed so that his horse was upon the track, and his front wheels close to the north track, his little daughter cried out to look out for the car. He then looked, and saw it about half a block away, coming very rapidly. He urged his horse

*As to the care required of a traveler at a highway crossing where the view is obstructed, see foot-note appended to *Chicago & N. W. Ry. Co. v. Andrews* (C. C. A.), 12 R. R. R. 584, 35 Am. & Eng. R. Cas., N. S., 584; foot-note appended to *Confer v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 428, 36 Am. & Eng. R. Cas., N. S., 428.

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to greater speed, reaching a velocity of about three miles an hour, but before getting across was struck and injured. Upon the trial the jury found by special verdict that the defendant was guilty of negligence proximately causing the injury, and that plaintiff was not guilty of contributory negligence, and that it was consistent with due care, after first seeing the car, to have failed to ascertain thereafter that its speed and position was such as to render dangerous an attempt to cross in front of it. Defendant made several motions, and, amongst others, one to set aside and reverse the answers to these two questions relating to contributory negligence, and for judgment in its favor upon the verdict so amended. Its motion was denied, and judgment rendered for the plaintiff, from which the defendant appeals.

Spooner & Rosecrantz, for appellant.

W. B. Rubin, for respondent.

DODGE, J. (after stating the facts). This case falls so clearly within the principles announced in a long line of decisions, and so completely within the material facts of such cases as *Nolan v. Railway Co.*, 91 Wis. 16, 64 N. W. 319; *White v. Railway Co.*, 102 Wis. 489, 78 N. W. 585; *Koester v. Railway Co.*, 106 Wis. 460, 82 N. W. 295, and *Guhl v. Whitcomb*, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889—that extended discussion, or even reiteration of the reasons controlling it, cannot be justified. Due care in approaching a railway track can be satisfied only by the full use of the senses of sight and hearing at the last moment of opportunity before passing the line between safety and peril. *Schroeder v. Railway Co.*, 117 Wis. 33, 38, 93 N. W. 837. The last moment for such observation in the present case was just before plaintiff's horse stepped upon the track on which plaintiff knew a car was approaching, for the evidence was undisputed that the movement of the horse was so slow and so without momentum as to approximate the plaintiff almost exactly to the situation of a foot passenger, as to whom it is pointed out that the single step onto the track is negligence unless, before taking it, he assures himself, by observation, of its safety, if the view is unobstructed. Had plaintiff, during the eight or nine seconds occupied in driving from the sidewalk crossing onto the track, looked even once more at the approaching car, he must have observed, according to his own description, that its speed was such as to make the crossing perilous unless he greatly accelerated the movement of his horse or that of the car was diminished. During all this period, however, with full opportunity to look and see, he proceeded without a glance, relying, if he thought at all, on his reasoning as to the safety. Reasoning, however, is not due care when opportunity for observation exists. It is only when deprived in some degree of such opportunity that one may, consistently with due care, rely on his judgment as to chances.

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Tesch v. Railway Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618; *Schroeder v. Railway Co.*, supra. Neither can he, as counsel suggests, rely on any assumption that a car is moving at a reasonable, or any other, rate of speed, where he has opportunity to observe the contrary.

Respondent's counsel also seems to invoke the doctrine of a right of way in favor of plaintiff, and cites thereto *Tesch v. Railway Co.*, supra. That no such right existed when, as established by the result, some diminution of the speed of the car was necessary to enable him to pass in safety, is fully declared in that case and in *Stafford v. Railway Co.*, 110 Wis. 331, 335, 85 N. W. 1036; but whether it did or not is immaterial. It may be the most obvious negligence to exercise a clear right, and, if so, and contributing, it precludes plaintiff from recovery. *Brown v. Railway Co.*, 109 Wis. 384, 85 N. W. 271; *Watermolen v. Railway Co.*, 110 Wis. 153, 157, 85 N. W. 663.

As result of these considerations we deem it conclusively established beyond difference of opinion that "a person in the exercise of ordinary care, under circumstances similar to those surrounding the plaintiff, after first seeing the car, would have ascertained at some time thereafter, and before the horse reached the first track, that the speed and position of the car as such was to render an attempt to cross in front of the car dangerous," and that "want of ordinary care on the part of the plaintiff did contribute to produce the injury he received"; hence that the negative answers to these two questions—respectively the fourth and fifth of the special verdict—should be set aside, and affirmative answer substituted by the court upon defendant's motion for such order.

Judgment reversed, and cause remanded, with directions that the circuit court grant defendant's motion to change the answers to the fourth and fifth questions in the special verdict from "No" to "Ycs," and upon the verdict, as so changed, to enter judgment for defendant.

BIRMINGHAM BELT R. CO. v. GERGANOUS.

(Supreme Court of Alabama, Dec. 22, 1904.)

[37 So. Rep. 929.]

Accident on Track in Highway—Negligence—Violation of Ordinance Limiting Speed—Absence of Headlight and Signals—Sufficiency of Complaint.*

The complaint alleged that, while plaintiff was in a vehicle on a public highway, defendant, in the operation of a railroad train, caused it to run against the vehicle, as a proximate consequence whereof plaintiff was thrown from the vehicle and injured, and that the

*As to whether the violation of an ordinance limiting speed of trains is negligence, see foot-notes appended to *Omaha St. Ry. Co. v. Larson* (Neb.), 12 R. R. R. 643, 35 Am. & Eng. R. Cas., N. S., 643.

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injuries were suffered as a proximate consequence of the violation of an ordinance of the city as to the speed of a train running backwards, and as to running in the nighttime without a headlight or without the usual signals. The complaint was demurred to as not showing what duty defendant owed plaintiff, or that defendant neglected any duty which contributed to the injury, that the facts did not show any negligence for which defendant was chargeable, that it was not alleged in what manner defendant was negligent, that it was not alleged that plaintiff was on or near the railroad for any lawful purpose, and that it was not alleged that defendant inflicted the injuries willfully or wantonly: *held*, that the demurrer was properly overruled.

Appeals—Exceptions.

Where a party reserves no exception to the oral charge of the court, he cannot complain of the same on appeal.

Instructions.

A party has no right to complain that the court gave one of his written charges, even if previously refused, and then given by the consent of the other party, simply because the charge did not thoroughly harmonize with the court's oral charge.

Action for Personal Injuries—Wantonness—Intentional Wrong—Count in Trespass—Actual Participation by Defendant.

A count for personal injuries, averring that defendant railroad company wantonly and intentionally caused or allowed a railroad train to run against plaintiff's vehicle, since it involves the actual participation of defendant in the act of running the train, and not merely defendant's responsibility for the act of a servant, is in trespass, and not in case, and, to sustain it, proof of such actual participation in the tort on the part of defendant is essential.

Appeal from City Court of Birmingham; W. W. Wilkerson, Judge.

Action by James Gerganous against the Birmingham Belt Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This action was brought by the appellee, James Gerganous, against the Birmingham Belt Railroad Company, to recover damages for personal injuries. The complaint contained three counts, which were in words and figures as follows:

"First Count. The plaintiff claims of the defendant two thousand dollars as damages, for that, heretofore, to wit, on the 19th day of July, 1901, defendant was operating a certain train upon a railway, which train was composed of a steam locomotive engine and certain cars, and said railway ran along or across a public highway in the city of Birmingham, Jefferson county, Alabama, and was on grade with same; that on said day, while plaintiff was in a vehicle to which a team was attached, and was upon said public highway in said city, said train ran upon or against said vehicle or one of the animals composing said team, and, as a proximate consequence thereof, plaintiff was thrown or caused to fall or jump from said vehicle, his back was injured and sprained, his side was cut and bruised, he was injured internally, was shocked and otherwise injured in his person, was made sore and sick, suffered great mental and physical pain, his health and physical stamina were greatly and permanently impaired, he was rendered for a long time less able to work and earn

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money, was rendered permanently less able to work and earn money, plaintiff's vehicle was greatly injured or destroyed, plaintiff's said team was greatly injured and their value lessened, and plaintiff's harness was greatly injured or destroyed, and plaintiff was put to great trouble, inconvenience, and expense for medicine, medical attention, care, and nursing in or about his efforts to heal and cure said wounds and injuries. Plaintiff alleges that defendant negligently caused or allowed said train to run upon or against said vehicle or animal as aforesaid, whereby plaintiff suffered said injuries and damages as aforesaid.

"Second Count. Plaintiff refers to and adopts all the words and figures of the first count from the beginning thereof, to and including the words 'heal and cure his said wounds and injuries,' where they first occur together in said count. Plaintiff further avers that defendant wantonly and intentionally caused or allowed said train to run upon or against said vehicle or animal as aforesaid, and inflict upon plaintiff the injuries and damage aforesaid.

"Third Count. Plaintiff refers to and adopts all the words and figures of the first count from the beginning thereof, to and including the words 'heal and cure the said wounds and injuries,' where they first occur together in said count. Plaintiff further avers that said train run upon or against said vehicle or animal as aforesaid, and plaintiff suffered said injuries and damage as a proximate consequence of the violation by defendant of section 466 of the City Code of Birmingham, which is as follows: 'Sec. 466. Speed—Headlight—Signals.—Any person who causes, permits or suffers any locomotive engine to run within the city limits at a greater rate of speed than eight miles per hour when running forward, or four miles per hour when running backwards, or who causes, permits or suffers any locomotive engine or train to run or move in the nighttime without a headlight, or who shall cause, permit or suffer any locomotive or train to run at any time without causing the usual signals to be given continuously, by ringing the bell or otherwise, must, upon conviction, be fined not less than one or more than one hundred dollars.' Said violation of said ordinance consisted in this, viz: Defendant caused, permitted, or suffered said locomotive engine to run within the limits of said city at a greater rate of speed than four miles per hour, when running backwards; defendant caused, permitted, or suffered said train to run or move in the nighttime without having a headlight; defendant caused, permitted, or suffered said train to run without causing the usual signals to be given continuously by ringing the bell or otherwise. All to plaintiff's damage ten thousand dollars, wherefore he sues."

To the first and third counts of the complaint the defendant demurred, upon the following ground: "(1) It is not shown by said count what duty defendant owed the plaintiff.

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(2) It is not shown by said count that the defendant neglected any duty to the plaintiff which caused or contributed to cause the injury complained of. (3) The facts alleged in said count do not show any negligence for which the defendant is liable or chargeable. (4) It is not alleged or shown in said count how or in what manner defendant was negligent. (5) It is not alleged or shown by said count that the plaintiff was on or near said railway for any lawful or necessary purpose. (6) It is not alleged or shown by said count that defendant inflicted the injuries complained of willfully or wantonly. (7) No sufficient facts are stated in said count to show that the plaintiff was injured by reason of the want or willful negligence of the defendant, its agents or servants. (8) The facts are not so stated in said count that the defendant can take issue thereon. And the defendant demurs to the third count of the complaint, and assigns each of the grounds heretofore assigned to the first count, and the following additional grounds: (9) It is not alleged or shown how or in what manner the injury to the plaintiff was caused by or resulted from the rapid rate of speed at which said locomotive was run, the absence of a headlight, the failure to ring the bell or give other signals. (10) It is not alleged or shown that the defendant, its agents or servants, knew or had reason to believe that the failure to ring the bell or blow the whistle or give other signals, the absence of a headlight, or running the train backwards at a greater rate than four miles an hour, would inevitably or probably result in injury to the plaintiff or any one else." These demurrers were overruled.

Under the opinion on the present appeal, it is unnecessary to set out the facts in detail.

The defendant requested, among other charges, the general affirmative charge in its favor as to the second count of the complaint, and duly and separately excepted to the court's refusal to give said charge as asked.

The seventh assignment of error is in the following language: "The said city court erred in refusing to grant defendant's request that the oral charge delivered to the jury by the court be modified so as to conform to the certain written charge which plaintiff's counsel had consented should be given and read to the jury." In order to understand the question which is sought to be raised by this assignment of error, it will be necessary to state what took place on the trial, as shown by the bill of exceptions. The following facts are disclosed by the bill of exceptions: The court charged the jury orally in respect to the burden of proof, as follows: "The law says that when a person is injured in a collision at a crossing in a city by a train of cars, that the burden of proof is on the railroad company to acquit itself of negligence. Now, gentlemen of the jury, when an accident happens at a crossing in a city—collision at a crossing in a city—the law presumes that the defendant was guilty of negligence, and

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the burden is on the defendant to show that it was not negligent. If it shows that it was not, then, of course, it is not liable for the injury; it is a pure accident. Railroad companies have a right to go across streets just as much as pedestrians or persons in vehicles have a right to go across the street, and because a person is injured at a crossing it is not necessarily the case that the railroad company is liable for it. If the railroad company does everything it is required to do, and exercised all reasonable care it could do, and nevertheless the injury happens without any body's fault, the law says the railroad company is not liable in damages to the person injured. So, now, gentlemen of the jury, the burden of proof is on the railroad company to show that it did everything it ought to have done in running its train over Nineteenth street, and, if it shows that it was not guilty of simple negligence, the plaintiff would have no right to recover." The defendant requested the court, in writing, to give to the jury the following charge: "I charge you that the burden of proof is upon the plaintiff to reasonably satisfy you by the evidence that the defendant was guilty of negligence as charged in some count of the complaint, and if from all the evidence you are not reasonably satisfied of the truth of the averments of negligence as alleged in the complaint, then you must find a verdict for the defendant, without regard to the question of contributory negligence." The plaintiff's counsel consented that the written charge just above set out was the law of the case, and consented that it should be given to the jury. When the plaintiff's counsel assented that the written charge just above set out should be given to the jury, the defendant's counsel then requested the court to modify or change the oral charge in respect to the burden of proof, so as to make the oral charge conform to the proposition of law asserted in the written charge which plaintiff's counsel had consented was the law of the case. The court refused to grant that request, and the defendant thereupon excepted.

There were verdict and judgment for the plaintiff, assessing his damages at \$2,000. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Walker, Tillman, Campbell & Morrow, for appellant.
Bowman, Harsh & Beddow, for appellee.

ANDERSON, J. The first assignment of error in this case is based upon the ruling of the trial court in overruling the demurrers to counts 1 and 3 of the complaint. The demurrers were without merit, and were properly overruled.

When the court charges the jury orally, and the defendant reserves no exception to any part of the charge, he cannot subsequently complain of same. Nor has it the right to complain that the court gave one of its written charges, even if pre-

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viously refused, and then gave it by the consent of the plaintiff, simply because it did not thoroughly harmonize with the oral charge, and the refusal of the court to modify the oral charge will not work a reversal. If the trial court erred in the oral charge, the defendant could have protected itself by excepting thereto, and failing to do so, cannot now claim that it was hurtful. The written charge having been given at the request of the defendant, it cannot complain because the trial court granted the request; and, as the oral charge was not excepted to, its correctness is assumed, and the refusal of the court to modify same was not error.

The second or wanton count of the complaint is in trespass, not case, and involves the affirmative participation of the defendant in causing the injury. There was no evidence that this defendant ran or directed the running of the train in the manner complained of, and, as the defendant requested the affirmative charge as to this count, it should have been given. *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389; *Central of Ga. Ry. Co. v. Freeman* (Ala.) 37 South. 387.

The ruling of the trial court upon the evidence was free from reversible error.

Reversed and remanded.

McCLELLAN, C. J., and TYSON and SIMPSON, JJ., concur.

GREENE *v.* LOUISVILLE RY. CO.

(Court of Appeals of Kentucky, Feb. 16, 1905.)

[84 S. W. Rep. 1154.]

Street Railways—Care Due Other Users of Streets.*

Operators of electric street cars must exercise ordinary care commensurate with the circumstances, and must keep a lookout ahead of the car, when in a crowded highway, to secure the safety of others using the highway; and while such cars are entitled to the use of their tracks without obstruction, they can no more run down another vehicle by negligence than any other traveler on the highway may do so, although such vehicle may be upon the tracks.

Same—Care Due Person Driving on Track—Right to Use Track.†

While one driving on a street car track cannot recover for the consequences of a collision, when his presence on the track could not be discovered by the carmen, in the exercise of ordinary care, in time to avert the collision, yet such a one is not a trespasser on the track, and may

*As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-notes appended to *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91; *Holden v. Missouri R. Co.* (Mo.), 13 R. R. R. 440, 36 Am. & Eng. R. Cas., N. S., 440; *Anniston Electric & Gas Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312.

†As to the mutual rights and duties of street railways and other users of streets, see foot-notes appended to *Portsmouth St. R. Co. v. Peed's Adm'r* (Va.), 13 R. R. R. 65, 36 Am. & Eng. R. Cas., N. S., 65; *Conrad v. Elizabeth, etc., Ry. Co.* (N. J.), 13 R. R. R. 126, 36 Am. & Eng. R.

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anticipate that a proper lookout will be kept by the carmen, and that ordinary care will be exercised to avoid running into him.

Same—Same—Contributory Negligence.

In an action against a street railway for injuries to a driver of a vehicle, a charge that defendant had the superior, but not the exclusive, right to the use of its tracks, and that plaintiff should have used reasonable diligence, to keep out of the way of defendant's cars, was misleading, and in lieu thereof the court should have charged that plaintiff was lawfully upon the street, and had the right to use any part of it; that defendant was entitled to the use of its tracks for the free passage of its cars; that it was the duty of those in charge of defendant's cars to keep a lookout for persons and vehicles upon the track, and to exercise ordinary care to discover and avoid injuring them, and that it was the duty of plaintiff in using the street to exercise ordinary care for his own safety.

Ordinary Care—Definition.

Where the court in its charge used the terms "ordinary care," "reasonable diligence," and "reasonable care," it should, in an instruction defining ordinary care, have also told the jury that reasonable diligence or reasonable care is ordinary care.

Instructions.

Where the court charged to find for defendant unless defendant could have discovered plaintiff's peril in time to have avoided the injury, a further charge to find for defendant if the motorman exercised ordinary diligence to prevent a collision after he had discovered, or should have discovered, plaintiff's vehicle, was unnecessary, and should have been omitted.

Same.

In an action against a street railroad for injuries to one driving a vehicle, a charge to find for defendant if the motorman exercised ordinary diligence to prevent the collision after he should have discovered such vehicle on the track was an improper limitation on a previous charge to find for plaintiff if he was injured in the manner complained of in his petition, and such injury was caused by defendant's failure to exercise reasonable care, where there was evidence of other grounds of negligence than that stated in the limiting charge.

Appeal from Circuit Court, Jefferson County, Law and Equity Division.

"To be officially reported."

Action by Gus Greene against the Louisville Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

B. H. Young and M. W. Ripy, for appellant.
Fairleigh, Straus & Fairleigh, for appellee.

HOBSON, C. J. Appellant, Gus Greene, was driving his wagon eastward at the intersection of Twenty-Third and Portland avenues in the city of Louisville, when a street car propelled by electricity came up behind him, and ran into his wagon, throwing him to the ground, turning his wagon over, and injuring him, his horse, and his wagon. He was

Cas., N. S., 126; Louisville Ry. Co. v. Colston (Ky.), 12 R. R. R. 668, 35 Am. & Eng. R. Cas., N. S., 668; Haas v. New Orleans Rys. Co. (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442; foot-notes appended to Mathiesen v. Omaha St. Ry. Co. (Neb.), 11 R. R. R. 777, 34 Am. & Eng. R. Cas., N. S., 777.

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driving at the time on the track of the street railway laid in the street because that was the smoothest part of the highway; traveling at an ordinary trot, the wheels of the wagon being in the car tracks. He had a man on the hind end of his wagon to keep the boys from stealing the apples with which the wagon was loaded, and appellant had asked him, if he saw a car coming, to let him know. The first that appellant knew that a car was coming was when the man in the rear told him so. Appellant then turned his horse, and tried to get out of the way, but before he could do so the car ran into him. As shown by the proof for appellant, the car was running very rapidly, and gave no signal of its approach. An electric street light was burning at the intersection of Twenty-Third and Portland avenues, and the wagon was only 10 or 15 feet north of the crossing when struck. The motorman testified that he was not running fast, and did not see the wagon until he was within 30 feet of it, and after that he could not stop before he ran into it. He also testified that there was a dark place there from the shade of the trees. Appellant's proof was that there was a good light. The jury found for the defendant under the instructions of the court, and the plaintiff appeals.

The court gave the jury these instructions: "(1) The court instructs the jury that if the plaintiff was injured in the manner complained of in the petition, and that the accident and consequent injury, if any there was, was caused by the failure of the defendant or its employees to exercise reasonable and ordinary care in the operation of its car, then the law is for the plaintiff, and the jury should so find. However, the court further instructs the jury that the plaintiff was bound to exercise that degree of care and caution for his own safety that a person of ordinary prudence would exercise under the same and similar circumstances, and if the jury believes that the plaintiff did not exercise such a degree of care and caution, and the accident was occasioned thereby, then the law is for the defendant, and the jury should so find, unless the jury should further find that the defendant did or could have discovered the peril of the plaintiff in time to have avoided the injury to him by the exercise of reasonable diligence. (2) The court instructs the jury that the defendant company has the superior, but not the exclusive, right to the use of that portion of the street occupied by its tracks, and that when the plaintiff undertook to use that portion of the street it was his duty to use reasonable diligence to keep out of the way of the defendant's cars using the same track. (3) If the jury believe from the evidence that after the motorman in charge of the car should, by the exercise of ordinary care, have discovered or did see plaintiff's vehicle upon the track, such motorman exercised ordinary diligence, and brought into operation all the means at his command to prevent a collision with the plaintiff's vehicle, then the law

is for the defendant, and the jury should so find. (4) 'Ordinary care,' as used in these instructions, means that degree of care which a person of ordinary prudence would exercise under the same or similar circumstances." Appellant complains especially of the second instruction given by the court and of the refusal of the court to give the following instruction, which he asked: "The court instructs the jury that it was the duty of the motorman in charge of the defendant's car to keep a lookout for persons on the track, and if, by the exercise of ordinary care, the agents and servants of defendant in charge of the car could have discovered the presence of plaintiff in time to have stopped the car, or did see the plaintiff in time to have stopped the car, then the law is for the plaintiff, and the jury should so find."

It is incumbent on all travelers on the highway to exercise ordinary care for the safety of others using the highway. The operators of street cars are bound by this rule no less than other persons on the highway. The only difference between a street car and other vehicles is that it cannot turn aside as other vehicles, but must stay on the track, and it is entitled to the use of the track without obstruction from other vehicles; but it can no more run down another vehicle by negligence than any other traveler on the highway may do so, although the vehicle may be upon its track. In operating in public streets rapidly moving cars propelled by electricity it is incumbent on those having charge of them in the crowded highway to exercise care commensurate with the circumstances for the protection of others, and to this end they must keep a lookout ahead of the car. The failure of the court to so instruct the jury was prejudicial to appellant under the facts of the case. *Shearman & Redfield on Negligence*, § 485; *Thompson on Negligence*, § 1383; *Robinson v. Louisville Railway Co.*, 112 Fed. 484, 50 C. C. A. 357; *Louisville Railway Company v. Wood*, 2 Ky. Law Rep. 387; *Central Passenger Railway Company v. Chatterson*, 14 Ky. Law Rep. 663; *Owensboro Railway Company v. Hill*, 56 S. W. 21, 21 Ky. Law Rep. 1638.

If appellant was obstructing with his wagon the railway track, he might be punished for this under the city ordinance; but he was lawfully upon the highway, and had the right to use one part of it no less than another, although occupied by the track of the street railway. If, while on the street car track, he was struck by the car without negligence on the part of those in charge of the car when his presence on the track could not be discovered by them in the exercise of ordinary care in time to avert the injury, he cannot recover. But he was not a trespasser on the track, and he had the right to anticipate that a proper lookout would be kept by those in charge of the cars, and that ordinary care would be exercised by them as in the case of other vehicles to avoid running into him. In 27 Am. & Eng. Ency. of Law, p. 70,

the rule is thus stated: "While it is the duty of vehicles moving along street railway tracks to leave the tracks on the approach of cars, so as not to obstruct their passage, still those in charge of the cars must use reasonable diligence to prevent collisions, and the company is liable for injuries resulting from their failure to do so. Thus, where a vehicle is seen moving on the tracks ahead of a car, the motorman, gripman, or driver should bring his car under control, if possible, so as to avoid a collision if the driver of the vehicle fails to leave the track; but he is not required to bring the car to a stop unless the vehicle is sufficiently near to be reasonably considered in a position of danger. It has been held that, where a street car approaching from the rear runs down a wagon driving along the track, this is of itself sufficient evidence of negligence on the part of the street railway company, in the absence of special circumstances excusing such act, to carry the question to the jury. Where a street car is approaching from the rear a vehicle moving along the track, the person operating the car has not the right to proceed without regard to the presence of the vehicle, in anticipation that the vehicle will leave the track in time to give free passage to the car."

Instruction 2 was misleading, and should not have been given. In lieu of instruction 2 given by the court and in lieu of instruction 2 asked by the plaintiff the court should have told the jury that the plaintiff was lawfully upon the street, and had the right to use any part of it; that the defendant was entitled to the use of its tracks for the free passage of its cars; that it was the duty of those in charge of the defendant's car to keep a lookout for persons and vehicles upon the track and to exercise ordinary care to discover and avoid injuring them; and that it was the duty of the plaintiff in using the street to exercise ordinary care for his own safety and the safety of others. As the court used in instruction 1 the words "reasonable diligence" and "reasonable care," he should, in instruction 4, have told the jury that reasonable diligence or reasonable care is ordinary care.

Instruction 3 given by the court should be omitted. In so far as it was the converse of the last clause of instruction 1, it is unnecessary. There was evidence tending to show want of due precaution in other respects on the part of the operators of the car, and the instruction was an improper limitation on the first clause of instruction 1.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

TEXAS & P. RY. CO. *v.* SHOEMAKER et al.

(Supreme Court of Texas, Feb. 13, 1905.)

[84 S. W. Rep. 1049.]

Accident on Track—Proximate Cause.

In an action against a railroad for the death of persons killed by a train, evidence *held* insufficient to show that the unfitness of the engineer for his position, caused by a defect of vision, or the failure to give statutory signals at a crossing, was the proximate cause of the deaths. **Duty to Give Crossing Signals—Accident Not at Crossing.***

The duty of a railroad to give signals at a crossing is owed to those using the crossing, and not to persons at other places along the track. **Person Killed on Track—Lookouts—Presumption—Rebuttal—Engineer's Impaired Vision.**

Mere proof of an unexplained killing of persons on a railroad track, and of the fact that the engineer of the train suffered from an impairment of vision, does not overcome the presumption in favor of the railroad that a proper watch was kept by those on the engine.

Same—Lookout—Proximate Cause.

The failure of persons on an engine to keep a proper lookout along the track can only be deemed the proximate cause of the death of a person on the track when it appears that the keeping of such lookout would have prevented the fatality.

Causal Connection—Presumption.

The fact of causal connection between an alleged negligent act and an injury cannot be presumed.

Person Killed on Track—Contributory Negligence—Presumption.†

In an action for the death of persons on a railroad track, it cannot be presumed that deceased was guilty of contributory negligence.

Same—Production of Witnesses.

In an action against a railroad for the death of persons on the track, where the facts of the killing were unexplained, and plaintiff failed to introduce sufficient proof to *prima facie* sustain his cause of action, it was not incumbent on the railroad to produce the evidence of persons on the engine to explain their connection with the tragedy; but if such evidence would have made out a case for plaintiffs, which they could not otherwise prove, they should have called those persons.

Error from Court of Civil Appeals of Second Supreme Judicial District.

Action by Susan H. Shoemaker and others against the Texas & Pacific Railway Company. There was a judgment of the Court of Civil Appeals affirming a judgment for plaintiff (81 S. W. 1019), and defendant brings error. **Reversed.**

H. C. Shropshire and B. G. Bidwell, for plaintiff in error.
Stevenson & Ritchie and D. M. Alexander, for defendants in error.

*See foot-note appended to *Batchelder v. Boston & M. R. R.* (N. H.), 11 R. R. R. 545, 34 Am. & Eng. R. Cas., N. S., 545.

†As to whether there is a presumption of the exercise of due care on the part of a person killed by a train, see foot-notes appended to *Bain v. Northern Pac. Ry. Co.* (Wis.), 12 R. R. R. 31, 35 Am. & Eng. R. Cas., N. S., 31; foot-notes appended to *Riska v. Union Depot R. Co.* (Mo.), 11 R. R. R. 294, 34 Am. & Eng. R. Cas., N. S., 294; *Kansas City-Leavenworth R. Co. v. Gallagher* (Kan.), 11 R. R. R. 750, 34 Am. & Eng. R. Cas., N. S., 750.

WILLIAMS, J. The defendants in error recovered the judgment under examination for damages for the deaths of Charles and Fred Shoemaker, sons of defendant in error, who were killed by a train of plaintiff in error on the night of June 4, 1900.

The question upon which our decision depends is whether or not the evidence adduced at the trial in support of plaintiffs' action was legally sufficient to warrant the submission of the case to a jury. There have been two trials in the district court. At the first a verdict for defendant was directed and returned, which action was reversed by the Court of Civil Appeals, the majority holding that there was evidence to go to the jury, and Mr. Justice Stephens dissenting. At the last trial the submission of the questions involved to a jury resulted in a verdict and judgment for plaintiffs, which was affirmed by the Court of Civil Appeals, Mr. Justice Stephens being still inclined to the opinion that the evidence was insufficient, but assenting to an affirmance in deference to the former judgment of the court in obedience to which the district judge had acted. The question is before this court for the first time. The evidence is wholly circumstantial. The plaintiffs, with their two sons, lived in an inclosure, consisting partly of pasture and partly of cultivated lands, through which defendant's railroad ran from northeast to southwest. The field was north and the residence was south of and about 250 or 300 yards from the track. The track was fenced throughout the inclosure, but a private wagon road extended northwardly from the house, passed through the fences, crossed the track, and curved westwardly through the field. This was used by the family in carrying wagons and horses to and fro. They had been accustomed, when on foot, to take a shorter route, going through the fences and across the track west of the wagon road, and in this way a footpath had been worn which ran westwardly for some distance from the house and divided into two branches, one of which turned northwardly, crossing the railroad and intersecting the wagon road at one point, while the other continued in a westerly direction, and crossed the railroad and converged with the wagon road at other points further west. Just east of the inclosure neighborhood roads, much traveled, converged and crossed the track where there was a crossing. The railroad runs through a cut in the inclosure upon a grade descending to the west. Millsap, a station on defendant's road, is $2\frac{1}{2}$ or 3 miles west or southwest, and a church a short distance east or northeast, of the inclosure. People in considerable numbers had been for years in the habit of walking, day and night, upon the railroad track going to and from these points to church, to school, and about other business or pleasure. The evidence shows that this had been observed by employees of defendant, such as sectionmen, trainmen, and roadmaster, and none of the witnesses had heard of any objection being raised.

For some time before the accident members of the Shoemaker family, including Fred and Charles, had been ill with measles, and the hearing of the two boys had been to some, but not a great, extent, impaired. Members of the family had also lost sleep in waiting upon the sick. During the afternoon of June 4, 1900, a brother-in-law, whose health was precarious, went to Millsap and remained away so long that the family became uneasy about him, and Fred and Charles went in search of him, Fred taking the wagon road and Charles the footpath going towards the railroad. The time of their leaving, by a watch which was not reliable, was noted to be 10:10 p. m. They were never afterwards seen alive. Their mangled remains were found next morning and near the railroad track, between the points where it was crossed by the two footpaths, and about 250 or 300 yards from the house. The body of Fred was on the track between the rails, crushed into a shapeless mass. There were evidences to the east of the two bodies having been dragged along the track. The trunk of Charles, with head, both feet, and an arm off, was found lying at the ends of the ties on the south side of the dump 40 to 60 yards west of Fred's remains and about 20 feet east of the most westerly footpath. Fragments of bodies, shoes, etc., were found between the two bodies, and other parts were found further west. A piece of cloth from the trousers of one of the boys was found at a point some seven miles west of this place. The shoes found were all torn except one, which sat on the outside of the rail, and appeared to one of the witnesses as if it had been "pulled off and set own." It fastened with a buckle, and had been unfastened, and was uninjured. Its position seems from the record to have been between the two bodies.

The trains which were scheduled to pass this point between the times of the disappearance of the deceased and the discovery of their bodies were as follows, taking the time of their arrivals at Millsap: No. 92, east-bound, 10:45 p. m.; No. 5, passenger west-bound, about 11:00 p. m.; first No. 13, west-bound, 1:30 a. m.; second No. 13, west-bound, 5:40 a. m.; and No. 6, east-bound, 5:15 a. m. No. 5 is shown to have been on time that night, and some of the evidence indicates that No. 92 passed east after the boys left the house. As to the others, the record is silent. The conclusion from this is that other trains besides the one that struck the boys probably passed over one or both of their bodies, rendering it utterly impossible to know their position when they were first struck. The plaintiffs' theory is that the boys were killed by No. 5, the fast passenger, or "Cannon Ball train," as it is called by the witnesses; and a witness testified that on the night of the killing he observed blood upon the pilot of the engine of that train at a point several miles west of Millsap. It appears that on the 5th, after the accident, the foreman of the defendant's shops at Ft. Worth received a

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message from Big Springs, 180 miles west of Ft. Worth, that some parties had been killed, and he examined all of the engines going east that day and found no evidence on them. The engine of train No. 5 did not return until the 6th, and was not examined. The plaintiffs claim that the engineer on this train, one Waldron, was unfit for his position by reason of a defect in his sight, which would interfere with the discovery of objects on the track. Evidence tending to show that his sight was impaired was introduced by the plaintiffs, and defendant produced rebutting evidence. If it were necessary to decide whether or not this evidence, when all of it is considered, really went to the extent of showing such an impairment of vision as to justify the inference intended, namely, that the engineer was incapacitated to keep a proper lookout, we should find difficulty in reaching an affirmative answer; but we may concede this point to the plaintiffs. The evidence further shows that the railroad track for a long distance east of the point of the accident is straight and unobstructed, and that on the night in question the moon was shining brightly; that no signal was given by those operating the passenger train for the road crossing just outside of plaintiffs' inclosure; that the train moved rapidly down the grade with the steam shut off, and making little noise as compared to that commonly made by a train using steam. This was the manner in which it ordinarily passed that point, and the evidence discloses nothing unusual in its management. It further appears that the boys were 18 and 19 years of age respectively, that they had worked upon the railroad, were accustomed to walk upon this track, and the evidence justifies no other inference but that they knew of the constant passing of trains and of the time when this train was due at that point.

The question to be decided is whether or not from these circumstances the jury were authorized to infer the facts from which the liability of the defendant would result. The two leading facts were: First, that the defendant or its servants were guilty of some act or omission which, if injury resulted therefrom, would constitute actionable negligence; and, second, that such act or omission proximately caused the deaths for which the suit is brought.

We have assumed, for present purposes, that there may have been such unfitness in the engineer of No. 5 as to show that the defendant was negligent in retaining him in such a position, and we shall likewise assume that the crossing outside of plaintiffs' inclosure was such as to require the giving of statutory signals. We are of the opinion that the jury could properly have found that the boys were killed by the passenger train; so that, if the evidence warranted the conclusion that the unfitness of the engineer, or the failure to give the signals, was the proximate cause of the deaths, the court was right in submitting it to the jury, unless contributory

negligence on the part of the boys affirmatively appears. But upon this question of proximate cause, in our opinion, the case hopelessly fails. No one can say from the evidence that the boys were at the crossing, or that the failure to give the signals had anything to do with the deaths. So far as any inference can be drawn from the appearances stated, it is that they were upon the track and away from the crossing. The specific duty to give the signals was to those using the crossings, and not to persons at other places. The absence of such signals may sometimes affect the conduct of persons on the track at other places than crossings, and so it might, if all the facts were known, affect the question of contributory negligence here; but, by itself, it constitutes no breach of any duty to the boys, so far as can be seen from the evidence. The unfitness of the engineer only affects the question as to whether or not a proper watch was kept along the track. The presumption is that there was, and it will hardly do to say that it is overcome by mere proof of the unexplained killing and of the engineer's defective vision. There was also a fireman on the engine, who, for aught that appears, could have performed this duty so far as it affected the deceased. But, aside from this, the failure to keep a proper lookout, either from incapacity or other reason, could only be deemed the proximate cause of the deaths when it appeared that the keeping of it would have prevented the unfortunate occurrence, and no inference of this fact can be drawn from the evidence. What were the boys doing as the train approached them? How long were they on the track before they were struck? What was their position? An answer to these questions must be found before it can be said that there was a failure to keep a proper lookout, and that such a lookout would have discovered them in danger in time to have enabled those controlling the train to have saved them; and for such answer the evidence may be searched in vain. This fact of causal connection between an alleged negligent act or omission and an injury can no more be presumed than can the act or omission itself. *Mo. Pac. Ry. Co. v. Porter*, 73 Tex. 307, 11 S. W. 324; *T. & N. O. Ry. Co. v. Crowder*, 63 Tex. 505. Our reference to the last case makes it proper for us to say that there is no presumption that the deceased were guilty of contributory negligence, and that the burden of proof was not upon plaintiffs to show that the deceased were not so guilty. But neither is there a presumption that the defendant was guilty of negligence which caused their deaths. The facts of the case are, however, at least as suggestive of negligence on their part contributing to their deaths as they are of such negligence on the part of the servants. The trouble about the evidence is that it merely reveals an unfortunate and deplorable occurrence, without enabling us to see what each of the parties contributed towards bringing it about, and leaves the case very much in the same attitude as those cited.

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It is urged that the defendant should have produced the evidence of those on the engine to explain their connection with the tragedy. It appears that the engineer died before the first trial, but some time after the suit was brought, and that the fireman is still living and in the service of the defendant. The manner in which their train passed the point of the accident and proceeded on its way indicates strongly that those on the engine did not know of the occurrence. *Railway v. Hewitt*, 67 Tex. 476, 3 S. W. 705, 60 Am. Rep. 32. A defendant cannot be called on to produce evidence where the plaintiff has failed to bring sufficient proof to prima facie sustain his cause of action. 2 Wharton on Evidence, § 1268. In the case relied on in this connection (*Railroad Co. v. Hewitt*, 67 Tex. 482, 3 S. W. 705, 60 Am. Rep. 32), a child was shown to have been upon a street railway in front of an approaching mule car, under such circumstances that the driver ought apparently to have seen it in time to have avoided running over it. In other words, the evidence warranted the inference of negligence in the failure to see the child, and it was with reference to this that Judge Stayton made the remark quoted by counsel as to the duty of the defendant to call the driver as a witness to explain the occurrence more fully. The difference is that in this case the evidence shows nothing of the situations and conduct of the parties immediately leading to the casualty. If the fireman's testimony would have made out a case for the plaintiffs when they could produce no other, they should have called him. *G. H. & S. A. Ry. Co. v. Faber*, 77 Tex. 155, 8 S. W. 64.

We have, so far, not discussed the contention as to the negligence in the speed of the train, because we are of the opinion that no such running is shown as, in connecting with the place of the accident and the circumstances surrounding it, evidences negligence. 4 Elliott on Railroads, § 1589. Besides, the plaintiffs labor under the same difficulty in this which we hold to be fatal to their recovery on other grounds of negligence, that they are unable to adduce any evidence that the rate of speed was the proximate cause of the deaths.

The views expressed render it unnecessary to consider the question as to whether or not the facts show affirmatively a prima facie case of contributory negligence on the part of the deceased. The evidence being legally insufficient to authorize a recovery of plaintiffs, the judgments will be reversed and judgment rendered for the defendant.

Reversed and rendered.

SMITH v. PITTSBURG, C., C. & ST. L. RY. CO.

(Supreme Court of Pennsylvania, Dec. 31, 1904.)

[59 Atl. Rep. 1077.]

Negligence—Explosives—Contributory Negligence.

Where, pending a fire in a railroad yard, plaintiff was walking along the street, on which the ordinary travel had not stopped, some 260 feet from where the cars in the yard were burning, and 40 feet above them, and there was an explosion of naphtha in the cars, and at the time the employees of the railroad company and of the fire department were working within 30 feet of the cars, the question whether plaintiff was guilty of contributory negligence is for the jury.

Appeal from Court of Common Pleas, Allegheny County.

Action by Charles F. Smith against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant presented these points:

“(1) Under the pleadings and evidence in this case, the verdict should be for the defendant. Answer. Refused.

“(2) It is the uncontradicted evidence in this case that at the time of the commission of the defendant's alleged negligent act, to wit, the collision and catching fire of the cars in the Sheraden yards, the plaintiff was miles away, in Allegheny City, and in a place of perfect safety; that plaintiff's attention was attracted to the conflagration at Sheraden by hearing the first violent explosion and seeing the smoke, and that explosion and smoke, and the knowledge that the plaintiff had thereof, was the cause of his going to Sheraden; that, before plaintiff descended into the Cork's Run Valley, he knew that the conflagration was not in dangerous proximity to his sister's dwelling, and before he arrived at his sister's house he passed in close proximity to the burning tank cars, and had knowledge of the fact that the conflagration was caused by the burning tank cars; that, after plaintiff arrived at his sister's house, he went down on the street at the north side of the railroad, on the bank above the fire, and stood there with his sister, discussing the fire; that at that time there was a great conflagration raging, and the escaping gas was making a loud and threatening noise; that from the place where he was when, as he testified, he made up his mind to go home, his nearest route lay along Zephyr and Glenmawr avenues, on the north side of the track, to the ferry at the mouth of Cork's run, but, instead of taking this route, he went west along the north side of the tracks to Sheraden Station, crossed over the tracks, and took the road known as 'Chartiers Avenue,' on the south side of the tracks, and immediately adjacent to the railroad company's right of way and yard where the conflagration was raging; that he walked along this road about 1,500 feet, directly towards the

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burning tank cars, and was at the time of the explosion in the immediate vicinity of the burning tank cars; that, when he approached the burning tanks on the road, he knew he was nearing a dangerous place, and was taking the chances of getting past in safety. Under these circumstances, plaintiff took the risk of injury, and the verdict should be in favor of the defendant. Answer. Refused."

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, POTTER, and THOMPSON, JJ.

William S. Dalzell, for appellant.

L. K. Porter and S. G. Porter, for appellee.

FELL, J. The only question raised by the assignments of error is whether a verdict should have been directed against the plaintiff on the ground of contributory negligence. Through an accident in the defendant's yard at Sheraden, a number of tank cars, containing a large quantity of naphtha, were set on fire. The fire was communicated to other cars in the yard, and there was an extensive and disastrous conflagration, which lasted several hours. Three hours after the fire started there was an explosion, which threw burning naphtha beyond the limits of the yard, and onto the street where the plaintiff was walking. The plaintiff testified that he had come from his home, on the opposite side of the Ohio river, because of his apprehension that the fire might spread and extend to the house of his sister, in Sheraden. Having assured himself of her safety, he started at once to return to his home by way of Chartiers avenue, a borough street, the route by which he had come. Not finding a car on the avenue, he walked on until one should overtake him. When he was opposite the place where the cars were burning, and 40 feet above and 260 feet from them, the explosion occurred. At this time the ordinary travel on the avenue had not stopped, and the electric cars were running as usual. The employees of the railroad company and of the fire department were working in the yard, within 20 or 30 feet of the cars. The plaintiff had passed the fire on his way to his sister's house, and knew that some of the cars contained oil or naphtha, and was hurrying by, but there was nothing in the situation so clearly indicating danger to one passing on the avenue that the court could have withdrawn the case from the jurv. It was submitted on the narrow ground that a recovery could be had only in the event that the plaintiff was on the street in the pursuit of his legitimate business, and not loitering or standing there out of curiosity, and that the danger of an explosion was not so apparent that a reasonably prudent man would have recognized it and not attempted to pass.

The judgment is affirmed.

ATLANTA, K. & N. RY. CO. *v.* GARDNER.

(Supreme Court of Georgia, Feb. 1, 1905.)

[49 S. E. Rep. 818.]

Negligence—Pleading.

A separate count in a petition claiming damages for negligence, which alleged in general terms that the defendant was guilty of negligence, should have been stricken on special demurrer setting up that it failed to set forth the particulars in which the defendant was negligent, unless the defect therein was cured by amendment.

Personal Injuries—Earning Capacity—Absence of Evidence—Measure of Damages—Province of Jury.

On the trial of an action brought by a minor for permanent personal injuries, when no evidence was submitted in reference to the earning capacity of the plaintiff prior to the injuries, there was no measure of damages for such injuries except the enlightened consciences of impartial jurors, guided by the facts and circumstances of the particular case. A charge to this effect was not inapplicable in the present case.

Duty to Avoid Consequences of Another's Negligence—Instructions.

There was no expression of opinion upon the facts of the case in charging the jury that "the duty resting by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the danger is impending, or the circumstances are such that an ordinarily prudent man would have reason to apprehend its existence." Nor was this charge erroneous because the court failed, in the same connection, to charge that if the plaintiff could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, there could be no recovery.

Same—Contributory Negligence—Whether Doctrine Invoked.

In a suit for damages for personal injuries alleged to have been sustained in consequence of the negligence of the defendant, the law of contributory negligence was not involved, if the person injured did not fail to exercise ordinary care for his safety before the negligence of the defendant was either apparent or should have been apprehended by him, and could not after that time have avoided the consequences of such negligence by the exercise of ordinary care.

Contributory Negligence—Diminution of Damages—Statute—Instructions.

On the trial of such an action against a railway company, a charge that "failure to exercise ordinary care on the part of the person injured before the negligence complained of is apparent or should be reasonably apprehended would not preclude a recovery, but would authorize a jury to diminish the damages in proportion to the fault of the person injured," did not properly present to the jury the imperative requirement of the Civil Code of 1895 (section 2322) in reference to the diminution of the plaintiff's damages in such a case.

Same—Same—Same—Same.

As Civ. Code 1895, §§ 2322, 3830, involve separate and distinct defenses to cases of this character, a rule applicable to one of them alone should not be given in immediate connection with the other, without appropriate explanation. We will not say, however, that the charge complained of on this ground was necessarily so confusing to the jury as to be cause for a new trial.

Contributory Negligence—Duty to Instruct.

Under the pleadings and the evidence in this case, it was erroneous not to charge the principle that if the plaintiff, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence, she could not recover, although the court was not requested to so charge by the defendant.

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Same—Same.

The court should not only state the contention of a party to the jury, but should also state the law applicable to such contention.

Same—Instructions.

Charging the principle laid down in Civ. Code 1895, § 2322, that "no person shall recover damages of a railroad company for injury to him or his property" where the same "is caused by his own negligence," is not equivalent to charging the principle, contained in section 3830, that, "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover."

Personal Injuries—Evidence—Mortality Tables.*

"On the trial of an action for personal injuries alleged to be permanent, mortality tables are not proper evidence, and instructions as to their use are inappropriate, unless there be some evidence as to the value of the plaintiff's services or capacity to earn money."

Same—Same—Complaints of Pain.†

On the trial of such an action, complaints made by the plaintiff to her attending physician of pains in designated portions of her body were not admissible in evidence in her favor, unless made under such circumstances as to be equivalent to spontaneous and involuntary exclamations or outcries, groans, convulsive movements, and other physical manifestations of present pain and suffering.

Harmless Error.

Though a question propounded to a witness was irrelevant and objected to upon this ground, yet if the answer thereto was not unfavorable to the objecting party, or stated only an admissible fact, the overruling of the objection to the question was not cause for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Pickens County; Geo. F. Gober, Judge.

Action by Ruth Gardner, by her next friend, against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Ruth Gardner, aged 17 years, by her next friend, Hiram L. Gardner, brought suit in Pickens county against the Atlanta, Knoxville & Northern Railway Company for \$15,000, as damages resulting from physical injuries alleged to have been sustained by her in consequence of the negligence of the defendant company. The petition alleged that she "was driving a buggy," and "her route involved crossing over the defendant's railroad track upon a public crossing known as 'Whitfield's Crossing,' in Pickens county;" that she "drove said buggy, in the exercise of due care, towards said crossing, and just as she was crossing over the defendant's tracks, and just as she had cleared the tracks, a freight train of the defendant dashed upon the crossing, negligently and reck-

*See generally, foot-note appended to *Atlanta Ry. & Power Co. v. Monk* (Ga.), 9 R. R. R. 426, 32 Am. & Eng. R. Cas., N. S., 426.

†For authorities in this series on the question whether statements of injured persons are *res gestæ*, see foot-note appended to *Williams v. Southern Ry.* (S. Car.), 12 R. R. R. 604, 35 Am. & Eng. R. Cas., N. S., 604.

Exclamations of bodily pain as *res gestæ*, see *Gosa v. Southern Ry.* (S. Car.), 11 R. R. R. 693, 34 Am. & Eng. R. Cas., N. S., 693.

lessly frightening the horse, and causing him to plunge back, and so close was the train to the vehicle that some portion of the train near the front end of it caught the buggy and horse, tore the buggy to pieces, killed the horse, and threw [her] to the ground and greatly and permanently injured her." The petition further alleged that "defendant negligently failed to blow the whistle upon approaching said crossing for a distance of 400 yards, and negligently failed to check and keep checking upon approaching said crossing, so as to be able to stop in time should any person or thing be upon the crossing; and defendant negligently failed to whistle at all or to check at all, and negligently failed to keep a lookout ahead, and was negligently running said train at a speed of about 40 miles per hour, and negligently failed to exercise any sort of care in approaching said crossing." The sixth paragraph of the petition was as follows: "And for further cause of action, and by way of an additional count, plaintiff says that on the 27th day of May, 1902, at Whitfield's crossing in said county, she was injured by the running of the cars, locomotives, and other machinery of the defendant company, and the defendant failed to exercise all ordinary and reasonable care and diligence." The seventh paragraph set forth the extent and character of her physical injuries, her pain and suffering consequent thereon; that she "was a minor and an orphan, and was studying to perfect herself in the art of music, and said injuries have so disabled her that she has been unable to pursue her studies at all, and has, further, been unable to perform any kind of labor or service, either domestic or of any other character"; that "she was able to and did perform divers domestic services about the house, in the way of housekeeping and the like"; that "she was also able to sew, and assisted in sewing, and would shortly have so perfected herself in music as to be able to teach"; that "her services were of the value of \$15 to \$20 per month, and these have been destroyed for all the future"; that "her capacity to labor and earn money is totally destroyed"; that "doctor's and medical bills are \$250"; and that "for each and all of the foregoing items of damage plaintiff sues." The defendant demurred, both generally and specially, to the plaintiff's petition. The court overruled the demurrers, to which ruling the defendant filed exceptions pendente lite. After demurring, the defendant answered the petition, admitting that it was a corporation, and that the occurrence complained of happened in Pickens county, but denying all the other material allegations of the petition. Upon the trial the jury rendered a verdict in favor of the plaintiff for the sum of \$5,000. There was a motion for a new trial, which was overruled, and the defendant excepted, assigning error upon the exceptions pendente lite and upon the overruling of the motion for a new trial.

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Smith, Hammond & Smith, W. T. Day, and Clay & Blair,
for plaintiff in error.

Arnold & Arnold, F. C. Tate, and Geo. L. Bell, for defend-
ant in error.

FISH, P. J. (after stating the facts). 1. The only demurrer insisted upon in the brief and written argument of counsel for the plaintiff in error is the special demurrer to the sixth paragraph of the petition. This demurrer was upon the ground that this paragraph set forth only the conclusion of the pleader, "without alleging wherein defendant failed to exercise all ordinary and reasonable care and diligence." This demurrer should have been sustained, and this paragraph of the petition stricken. As will be seen from the above statement of facts, this paragraph began as follows: "And for further cause of action, and by way of an additional count, plaintiff says," etc.; so it is clear that this was an entirely separate and distinct count. "A count in a petition against a railway company, claiming damages for negligence, which alleges in general terms that the defendant was guilty of negligence, should be stricken on special demurrer setting up that the petition fails to set forth the particulars in which the defendant was negligent, unless the defect in the petition is cured by amendment." *Central Ry. Co. v. Weathers*, 120 Ga. 475, 47 S. E. 956, and cit. Whether in the present case the refusal of the trial judge to sustain the special demurrer to this count of the petition would have been sufficient ground for reversing the judgment below need not be determined, as a new trial should have been granted upon certain other grounds in the motion therefor.

2. One ground of the motion for a new trial complains of the following charge of the court: "Where a minor has suffered a permanent injury, and such minor is too young to have selected an avocation or to begin to illustrate her earning capacity, in such cases there is no measure as to the amount of damages, where such minor is entitled to recover therefor, except the enlightened consciences of impartial jurors, guided by all the facts and circumstances of the particular case." The errors assigned are: "(1) That this charge was inapplicable. (2) This charge (without qualification) gave the jury an incorrect rule as to the measure for damages sought by plaintiff for lost time, lost capacity, lost earnings, doctor's bills, and permanent injuries. These were matters for computation under other rules, and not to be left to the consciences of jurors, however impartial." This charge was not inapplicable to the facts of the case, as shown by the evidence before the jury, and, under those facts, there was no measure of damages except the enlightened consciences of impartial jurors, guided by all the facts and circumstances of the case. The petition did not allege that the plaintiff was earning any income at the time that she was injured, nor

that she had ever earned any, nor did the plaintiff undertake to sustain by evidence the allegations of the petition as to her earning capacity at the time she was injured. The plaintiff introduced no evidence whatever upon this subject, nor upon the subject of expenses incident to her injuries. As her case went before the jury, she was seeking to recover alone for pain and suffering and permanent injuries, without undertaking to furnish the jury by evidence with any standard from which to calculate the amount of diminution in her earning capacity. She did not rely upon loss of established earning capacity, for she did not offer to prove that she ever had any. The proof showed that she was 17 years old at the time she received the injuries complained of. So the charge excepted to was applicable to the facts of the case, and the legal principle charged was in accordance with the decision of this court in *Western & Atlantic Railroad Company v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320 (4). There it was held: "For a personal injury to a child nine years of age, including deprivation of a member, the law furnishes no measure of damages other than the enlightened consciences of impartial jurors, guided by all the facts and circumstances of the particular case. Amongst the results of the injury to be considered are pain and suffering, disfigurement and mutilation of person, and impaired capacity to pursue the ordinary avocations of life at and after attainment of majority." In that case Chief Justice Bleckley said: "A brief but excellent model of a charge upon the measure of damages, where the subject of the injury was a child, will be found in *Davis v. The Central Railroad*, 60 Ga. 329." The charge here referred to and commended was as follows: "There is no known rule of law by which witnesses can give you the amount in dollars and cents as the amount of the injury, but this is left to the enlightened conscience of an impartial jury. This does not mean that juries can arbitrarily enrich one party at the expense of the other, nor that they should act unreasonably through mere caprice. But it authorizes you to give reasonable damages where the party shows that the law authorizes it. But the jury should exercise common sense and love of justice, and, from a desire to do right, fix an amount that will fairly compensate for the injury received."

3. Complaint was made in the motion for a new trial of the following charge of the court: "The duty resting by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the danger is impending, or the circumstances are such that an ordinarily prudent man would have reason to apprehend its existence. Failure to exercise ordinary care on the part of the person injured, before the negligence complained of is apparent or should be reasonably apprehended, would not preclude a recovery, but would authorize a jury to diminish the damages in proportion to the fault of the person injured."

While in the motion for a new trial there are several assignments of error upon this charge, the argument here by counsel for the plaintiff in error has taken a wider range than seems to be authorized by any of these exceptions. One point which has been much stressed is that the court erred in charging that the duty to exercise ordinary care to avoid the consequences of another's negligence does not arise "until the danger is impending"; it being contended, with much force, that the duty arises whenever such negligence is discovered, and that no danger may be impending to the discoverer at such time, and may never be if he then exercises ordinary care for his own safety. But none of the assignments of error upon this charge, in the motion for a new trial, presents the question here indicated. We will say, however, in passing, that the language of the court which has been thus criticised in the argument of counsel was, as we have seen, followed and qualified by the words, "or the circumstances are such that an ordinarily prudent man would have reason to apprehend its existence." We do not think that there is any merit in the exception that this charge, "without qualification or further explanation, was calculated to mislead the jury, and was an expression of opinion that the danger was not impending, and should not have been apprehended by the plaintiff, at the time she was injured." There was no expression of opinion involved in the charge, and we do not see how the jury could have been misled into believing that there was. The failure of the court to distinctly charge the principle that the plaintiff could not recover if she could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, did not make the charge here excepted to erroneous. The failure to give this principle in charge at all has been properly excepted to in another ground of the motion, which we will hereinafter consider.

4. Another exception to this charge is based upon the second sentence thereof, quoted above. This exception is: "The jury should not have been restricted to the want of ordinary care on the part of the plaintiff before the negligence of the defendant became apparent or should have been apprehended. They should have been instructed that any negligence on her part contributing to her injury would require that the recovery in her favor be diminished in proportion to the amount of default attributable to her." The sentence of the charge here excepted to follows the second headnote in *Western & Atlantic R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802, being in almost its very language. If the plaintiff did not fail to exercise ordinary care before the negligence of the defendant was existing and was apparent or should have been reasonably apprehended by her, and after that time could have avoided the consequences to herself of the defendant's negligence by the exer-

cise of ordinary care, she was not entitled to recover at all. On the other hand, if, after she knew or ought to have apprehended the existence of the defendant's negligence, she could not by the exercise of ordinary care have avoided its consequences, then she did not by her own negligence contribute to the injuries which she sustained, and her damages should not have been diminished at all. The law of contributory negligence is not applicable to a case in which the facts show that the person injured did not fail to exercise ordinary care before the negligence of the defendant was either apparent or should have been apprehended by him, and could not after that time have avoided the consequences of such negligence by the exercise of ordinary care. This we understand to be the doctrine laid down in *Western & Atlantic Railroad Company v. Ferguson*, supra, where Mr. Justice Cobb, speaking for the court, said: "From the expressions used and rulings made in the cases cited (and there are many others where similar expressions are used and similar rulings made), the rule of force with reference to the subject under investigation seems to be well settled, and may be thus stated: The duty imposed by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence of such other is existing and is apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. In such cases, and in such cases only, does the failure to exercise ordinary care to escape the consequences of negligence entirely defeat a recovery. In other cases—that is, where the person injured by the negligence of another is at fault himself, in that he did not, before the negligence of the other became apparent, or before the time arrived when as an ordinarily prudent person it should have appeared to him that there was reason to apprehend its existence, observe that amount of care and diligence which would be observed under like circumstances by an ordinarily prudent person—such fault or failure to exercise due care and diligence at such a time would not entirely preclude a recovery, but would authorize the jury to diminish the damages 'in proportion to the amount of default attributable to' the person injured."

5. Another exception to this charge is that "the charge gives the jury permission to reduce the verdict for plaintiff's want of care, but does not instruct them that it shall be done," and that "the jury should have been instructed that any fault on the part of the plaintiff would require that the damages be diminished by the jury in proportion to the amount of default attributable to her." We think this exception is well taken. The Civil Code of 1895 (section 2322) provides: "If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him." It is contended by

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counsel for defendant in error that the word "authorize," as used by the court in the expression "but would authorize the jury to diminish the damages," etc., is equivalent to "require," and, therefore, that this exception is not sound. This very question was raised in *Georgia Railroad v. Pittman*, 73 Ga. 325, and it was there held that: "Although the court charged that, if the officers of the railroad and the deceased were both at fault, the jury 'would be authorized to make such reasonable deduction,' yet where, in the same connection, he charged the rule of contributory negligence in the language of the statute, that 'the damages shall be diminished by the jury,' there was no error which requires a new trial." In the opinion Chief Justice Jackson said: "The error alleged in the twelfth ground struck us with some force during the argument, but on examination of the whole charge it disappears." Then, after stating that the point was that the court "merely authorized the jury to do what the statute made imperative upon them," and showing that the full charge did "tell the jury what the law is, a few paragraphs before this excepted to," he concludes that as the court gave the law, "its imperative requirement, as their authority, the plaintiff in error was not hurt by the language excepted to." The question came up again in *Krogg v. Atlanta & West Point Railroad Company*, 77 Ga. 202, 4 Am. St. Rep. 77, and it was held that "while in one part of the charge the judge erroneously stated that the jury would be authorized to reduce the damages if they saw proper, yet in other portions of the charge this inaccuracy was corrected, and no harm resulted from it." Judge Blandford, who delivered the opinion, said: "It is further contended that the court below committed manifest error in instructing the jury that they 'would be authorized to reduce the damages,' etc., if they see proper. We think this charge is objectionable, in that it turns the jury loose to do as they pleased, and we think the court should hold them well in hand; but we held in *Georgia Railroad v. Pittman*, 73 Ga. 325, that such a charge as this was cured by other portions of the charge, in which the court confined the jury to their duty as to their finding. Immediately after the charge complained of follow two charges by the court, the same being requests of the defendants' counsel, and these requests corrected the looseness of the charge complained of; so we think no harm resulted from the charge." It will be seen that in each of these cases a charge of the court similar to the one now under review was held to be erroneous, but that the error contained therein was harmless when such instruction was modified and explained by other portions of the charge wherein the law contained in the statute was correctly given to the jury. In the present case the trial judge failed to give the jury any other instruction whatever upon this particular subject, and so this particular instruction went before them without modification or

explanation. As said by Judge Hopkins, in the Law of Personal Injuries, § 208, "The section [2322] is imperative, and the court should hold the jury to it." The jury were not held to it by the charge in the present case, as they might well have believed that, while they were authorized to diminish the plaintiff's damages in proportion to her negligence, they were not required to do so.

6. The court charged the jury that "no person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence." This principle is laid down in this exact language in Civ. Code 1895, § 2322. The court then immediately gave the instruction, which we have been considering, relative to the duty to exercise ordinary care to avoid the consequences of another's negligence. One ground of the motion for a new trial is that it was error for the court to give these different rules of law in connection with each other, without further explanation. While the court failed to charge the jury the principle contained in Civ. Code 1895, § 3830, that, "if the plaintiff by ordinary care could have avoided the consequences to himself of the defendant's negligence, he is not entitled to recover," what the court did charge in reference to the time when the duty to exercise such care to avoid the consequences of the negligence of another arises was applicable only to the last-quoted section of the Civil Code. It has been frequently held that sections 2322 and 3830 involve separate and distinct defenses to cases of this character. For this reason, it has also been repeatedly held that to charge them in immediate connection with each other, without any explanation of their different meanings, is error. *Savannah, Florida & Western Ry. Co. v. Hatcher*, 118 Ga. 273, 45 S. E. 239, and cases cited. If the two sections should not be charged in immediate connection, without proper explanation, it follows that a principle which is applicable to only one of them should not, without appropriate explanation, be given in charge in immediate connection with the other. We will not say, however, that the charge complained of was for this reason necessarily so confusing as to be cause for a new trial.

7. Another ground of the motion for a new trial is that the court erred in failing to charge the jury that if the plaintiff, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence, she could not recover. Under the evidence in this case, the court should have given this principle of law in charge to the jury, and this ground of the motion alone was sufficient to require the grant of a new trial. Upon proof of the injury by the running of the defendant's locomotives and cars, a presumption of negligence arose against the company, and this presumption was not removed, because the company failed to show that its agents had "exercised all ordinary and reasonable

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care and diligence." It failed to show that it had complied with the statutory requirements applicable to railroad trains approaching public crossings. Consequently, as the case went before the jury, the defendant was bound to be liable to the plaintiff to some extent, unless the evidence disclosed that the plaintiff, by the exercise of ordinary care, could have avoided the consequences to herself of the negligence of the defendant. As the defendant contended that it was not liable at all, and relied, as it was obliged to do under such circumstances, upon the theory that the plaintiff could have avoided the consequences of its negligence by the exercise of ordinary care, the failure of the court to charge the law upon this subject deprived the defendant of its main defense. Counsel for the defendant in error contend that this was not an issue in the case, because the defendant's answer did not set up any contributory negligence; that it did not set up either want of ordinary care on the part of the plaintiff or negligence by the plaintiff, but merely denied the allegations in the plaintiff's petition, which simply amounts to a denial of the facts as charged, and to a denial of the negligence charged against the defendant. The plaintiff alleged that she drove the buggy in which she was riding, in the exercise of due care, toward the railroad crossing where the collision occurred which caused her injuries, and the defendant denied this. So, even under the pleadings, the parties were at issue upon the question of due care by the plaintiff in driving upon the railroad crossing at the time that she did. Besides, the defendant by its plea certainly denied any liability to the plaintiff; and if the jury, from the evidence before them, could have found that, notwithstanding the negligence of the defendant, the plaintiff, by the exercise of ordinary care, could have avoided the consequences to her of such negligence, the law applicable to such a state of facts was directly involved in the case, and the court should have given it in charge to the jury. In *Atlanta Railway & Power Co. v. Gaston*, 118 Ga. 418, 45 S. E. 508, it was held that where the evidence was conflicting, "but there was testimony from which the jury could have found that both parties were in the exercise of ordinary care and that the injury was the result of a casualty, it was error not to charge that the defendant could relieve itself of the statutory presumption by showing that neither party was to blame and that the damage was the result of a pure accident." In the opinion, Mr. Justice Lamar said: "But the mutual criminations and recriminations are not necessarily exhaustive of the substantial issues raised by the evidence, and as to which the jury must be instructed. Here it could have found that neither was to blame, and, that being true, it was requisite to charge what would be the result of such a finding. The failure to so charge deprived the company of the benefit of a substantial defense." Of

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course, there is no merit in the contention that the failure of the defendant to submit to the court a written request to charge the legal principle involved in this ground of the motion disposes of the ground. "Where the judge gives in charge substantially the law governing the case, if more specific instructions on any point are desired, they should be asked; but the law of the case must be given to the jury to the extent of covering the substantial issues made by the evidence, whether requested or not, or whether the attention of the court be called thereto or not; otherwise the verdict will be set aside." *Central Railroad v. Harris*, 76 Ga. 501, and cases cited; *Strickland v. State*, 98 Ga. 84, 25 S. E. 908; *Chattanooga R. Co. v. Voils*, 113 Ga. 361, 38 S. E. 819.

8. The able and ingenious counsel for the defendant in error seeks to show that the court did give the principle in question in charge to the jury, when, in the beginning of his instructions, he stated to the jury the respective contentions of the parties. It is one thing to state what a party contends, and another and a very different thing to state the law applicable to such contention. To state to the jury, as the court did, that the defendant contended that it had not "been guilty of any neglect, and that if the plaintiff was hurt it was done under such circumstances that the plaintiff, by the exercise of ordinary care and diligence, could have avoided any injury, if in fact she was injured, and that therefore the defendant [was] not liable," was far from being equivalent to charging the law laid down in Civ. Code 1895, § 3830.

9. Nor can we agree with counsel that the charging of the principle laid down in section 2322, that "no person shall recover damage of a railroad company for injury to him or his property where the same is done by his consent, or is caused by his own negligence," was equivalent to charging the principle contained in section 3830. This has been expressly ruled by this court. In *Central Railroad v. Harris*, supra, which was a suit by a wife for the homicide of her husband, it was held "that the defendant was entitled to have submitted to the jury both the question whether the plaintiff's husband caused the injury solely by his own negligence, and also whether, by the use of ordinary care, he could have avoided the consequences to himself caused by the defendant's negligence." In the opinion (page 508, 76 Ga.) Chief Justice Jackson said: "The railroad company had two defenses in this case, either of which would bar any recovery by the plaintiff. One is that the plaintiff's husband caused the killing by his own negligence; the other is that the plaintiff's husband could have avoided the consequence of the company's negligence by ordinary care. The first is found in section 3034 of the Code [now section 2322]; the last in section 2972 [now section 3830]. The two defenses are not the same. They are not identical." He then points out the difference between the two. This ruling was followed, at the same term of the

court, in *Central Railroad v. Thompson*, 76 Ga. 770 (9). The difference between these two sections of the Code had been previously pointed out and discussed in the concurring opinion of Justices Jackson and Blandford in *Savannah, Florida & Western Ry. Co. v. Stewart*, 71 Ga. 429, where they held (page 447, 71 Ga.) that "the two sections ought not to be construed as the same, but in *pari materia* as separate defenses." We have seen that even to charge these separate sections of the Civil Code in immediate connection with each other, and without explanation as to their different meanings, is erroneous.

10. Complaint is made in the motion for a new trial of a lengthy excerpt from the charge of the court in reference to the Carlisle Mortality Table, which was introduced in evidence by the plaintiff; the assignment of error being that "this charge was not authorized by the facts in evidence, and that it was calculated to mislead the jury." Under the decision of this court in *Macon, Dublin & Savannah Railroad Co. v. Moore*, 99 Ga. 229, 25 S. E. 460, instructions in reference to the mortality table and its use by the jury were erroneous. It was there held: "On the trial of an action for personal injuries alleged to be permanent, mortality tables are not proper evidence, and instructions as to their use are inappropriate, unless there be some evidence as to the value of the plaintiff's services or capacity to earn money." See, also, *Chicago, Burlington & Quincy R. Co. v. Johnson*, 36 Ill. App. 564. In the present case, as we have seen, the plaintiff did not even undertake to show the value of her services or her capacity to earn money.

11. Complaint was also made in the motion of the refusal of the court to exclude, as hearsay, certain testimony of Dr. Earnest, a physician who attended and treated the plaintiff, and whose depositions were taken and introduced in her behalf. The testimony in question was that the plaintiff "complained of backache and pains in her hips," and also of other physical ailments, and his statement that the evidence of some inflammatory trouble having existed consisted in the presence of some adhesions and some deposits in the broad ligaments, "and in the history given me by the patient herself of her having suffered certain pains for a considerable period past"—the quoted words being the testimony objected to. The witness had not been called in by the plaintiff to examine her for the purpose of qualifying himself to testify as a witness in her behalf, nor was he called in after suit brought, but he attended, examined, and treated her, as his patient, some months before the suit was instituted. We have devoted considerable time and investigation to the question here presented, and have examined a great number of cases in which, in one form or another, the question of the admissibility of statements of this character, made by one person to another, has been presented and determined. We

find that practically all of the courts in which the question has arisen hold that statements of present pain and suffering, made before suit brought, by a patient to his physician who has been called in solely for the purpose of examining, advising, and treating him, may be given in evidence by such physician, when called as an expert witness, as part of the facts upon which he bases his opinion as to the nature and extent of the patient's injuries or disease. As to the admissibility of statements of past pains or sensations, made by a patient to his physician, there is a decided conflict in the rulings of the courts, some holding that such statements are inadmissible, while others hold that it is admissible for the physician to testify to them when giving his opinion as an expert to the jury. The weight of outside authority, however, seems to be that statements or narratives of past pains and symptoms made by a patient to his physician are inadmissible. Some of the courts, impressed with the danger of opening the door of evidence for the admission of hearsay testimony, particularly in cases in which the hearsay statement may be of a self serving nature, hold that statements of the above character, even when made by a patient to his physician, are not admissible if made after suit brought by the patient for his injuries. Others hold that they are not admissible if made to a physician or surgeon called for the sole purpose of qualifying himself to testify, as an expert, in behalf of the plaintiff in action for damages. A few recognize no such distinction, but hold that the fact that the statements were made under such circumstances does not render them inadmissible, but is merely a circumstance to be taken into consideration by the jury in weighing the effect of such statements and the opinion of the expert based in part thereon. While we feel some hesitancy in laying down a rule in this state which will run counter to what seems to be the rule generally, if not universally, accepted elsewhere, we have reached the conclusion that there is no sound reason for making any exception in cases of this character to the rule which excludes hearsay testimony. In *Atlanta Street Railway Company v. Walker*, 93 Ga. 462, 21 S. E. 48, this court held that "since the change in the law allowing parties to testify in their own behalf," it is not "competent for a plaintiff, suing for physical injuries, to prove by his wife that subsequently to their infliction he frequently complained to her of pains and hurts resulting therefrom, and stated that he suffered a great deal." In that case the complaints were of present pain and suffering. In the opinion, Chief Justice Bleckley said: "The plaintiff's wife was permitted to testify to his complaints made in her hearing. She said he complained of his side a great deal; and, being told to state all his complaints, she said his head hurt him, and his side and leg; he suffered a great deal. Such evidence as this, by a witness other than the wife of a party,

was competent and admissible so long as the law excluded parties from being witnesses in their own behalf, but now that they are by statute competent to testify, and where, as in this case, the testimony is heard from the plaintiff himself, who knew the facts of pain and suffering, his wife, whose knowledge of them was derived from hearsay, was not competent to prove complaints which were no part of the *res gestæ* of the injury. The ground on which such evidence was formerly deemed competent was the ground of necessity. That necessity no longer exists. The higher and better evidence is that of the person who has actual knowledge of the truth of the pains and other feelings to which the complaints relate. This ruling was followed in *Savannah R. Co. v. Wainwright*, 99 Ga. 255, 25 S. E. 622. This is eminently sound reasoning, and applies as well in a case in which the complaints are made to the complaining person's physician as in a case in which they are made by a husband to his wife. The decision in *Feagin v. Beasley*, 23 Ga. 17, which was a suit for breach of warranty of the soundness of a negro slave sold by the defendant to the plaintiff, that the representations of the negro as to his symptoms, made during his medical examination, were admissible, was made at a time when the negro, being a slave, was not competent to testify against a free white person (*Grady v. State*, 11 Ga. 253), and his representations to the physician and others were admissible upon the ground of necessity, to which Judge Bleckley refers.

The distinction between statements of pain and suffering made to a physician and such statements made to any other person, so far as admissibility in evidence is concerned, has been rejected by a number of courts, including the Supreme Court of the United States, which held that: "The declarations of a party himself, to whomsoever made, are competent evidence, when confined strictly to such complaints, expressions, and exclamations as furnish evidence of a present existing pain or malady, to prove his condition, ills, pains, and symptoms, whether arising from sickness, or from an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person." *Northern Pacific Railroad Co. v. Urlin*, 158 U. S. 271, 275, 15 Sup. Ct. 840, 39 L. Ed. 977. In that case the statements in question were made by the plaintiff at various times to physicians who subsequently testified in his behalf, but, as seen above, the court refused to recognize a distinction, so far as admissibility in evidence was concerned, between statements made to medical attendants and similar statements made to any one else. So it is said, in *Greenleaf on Evidence*, that "the representation by a sick person of the nature, symptoms, and effects of the malady under which he is laboring at the time are received as original evidence. If made to a medical attendant, they are of greater weight as

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evidence; but if made to any other person, they are not on that account rejected." 1 Gr. Ev. (16th Ed.) § 162b. In this last edition of this work the editor thereof explains that statements of this character are not received as original evidence, but as exceptions to the hearsay rule; and, in his additions to the original text, he speaks of the limitation of the admissibility of such statements to those made to an attending physician as "unsound upon precedent, principle, and policy," and cites the following cases, in which such limitation has been repudiated: Northern Pacific R. Co. v. Urlin, *supra*; Hancock Co. v. Leggett, 115 Ind. 547, 18 S. E. 53; Chicago R. Co. v. Spilker, 134 Ind. 392, 33 N. E. 280, 34 N. E. 218; Louisville R. Co. v. Miller, 141 Ind. 533, 559, 37 N. E. 343; Cleveland R. Co. v. Prewitt, 134 Ind. 557, 33 N. E. 367; Baltimore R. Co. v. Rambo, 59 Fed. 75, 8 C. C. A. 6, 16 U. S. App. 277; Bagley v. Mason, 69 Vt. 175, 37 Atl. 287; Brown v. Mt. Holly, 69 Vt. 364, 38 Atl. 69. In the case of Rowell v. City of Lowell, 11 Gray (Mass.) 420, decided when that eminent jurist Chief Justice Shaw was at the head of the Supreme Court of Massachusetts, not only was no such distinction made, but it was held that, "in an action to recover for personal injuries, a surgeon who attended and prescribed for the plaintiff once, three months after the accident, and examined the injuries again after the action was brought, may be allowed to testify to his opinion of the plaintiff's condition, and the lasting character of the injuries, derived from what he saw, but not from any statements of the plaintiff." The ruling of the court below, excluding the opinion of the surgeon, formed "from the declarations of the patient" when he visited and prescribed for her before suit was brought, "as to her then state of feeling, and the examination [he then] made * * * as to the extent of the injury she was then laboring under," was affirmed. So we have eminent authority to sustain our view that, if complaints of a person of pain or other physical sensation which produce discomfort or suffering are admissible in evidence at all, there is no sound reason for distinguishing between those made to a medical attendant and those made to any one else. This being true, under the decision of this court in Atlanta Street Railway Company v. Walker, *supra*, it appears to us that the testimony now in question was inadmissible.

It is true that it was held in a later case that "exclamations or complaints made by a person undergoing physical examination by a physician with a view to ascertaining the extent of his alleged injuries, and apparently made in response to manipulations of the person's body or members by the physician, are admissible in evidence, though such person was not under the treatment of this particular physician, and the examination was being made solely for the purpose indicated. Whether or not the exclamations were involuntary, or the complaints were bona fide, is for determination

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by the jury under all the evidence submitted." *Broyles v. Prisock*, 97 Ga. 643, 25 S. E. 389. But the ruling in that case was put upon the ground that "complaints of pain which are made apparently in response to manipulation of the person do not come within the rule which excludes hearsay and self-serving declarations, and it is not necessary, in order to render them admissible, that they should be made to a physician for the purpose of treatment. Such complaints are regarded as manifestations of pain, as part of the *res gestæ* of the pain, and are not classed with mere descriptive statements." There complaints of pain, made in response to and co-incident with manipulations of the complaining person's body, were treated as being equivalent to involuntary exclamations of pain, convulsive movements of the body, flinching, or screaming when a particular portion of the body is pressed or touched, or other physical manifestations of bodily suffering. If they had not been put upon this ground, this decision would have been clearly in conflict with the one rendered in *Atlanta Street Railway Company v. Walker*, supra, and it was upon this ground that the two cases were then distinguished. There is, however, a still later decision of this court, in which the writer participated, which we have found it hard to reconcile with the case cited from 93 Ga., 21 S. E. We refer to the ruling in *Powell v. State*, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277, where it was held: "Evidence of pain and suffering by the accused on trial for murder, and who alleges in his defense that he was attacked and beaten by the deceased, is admissible, if confined to a reasonable period of time elapsing after the homicide; and exclamations or expressions indicating the existence of present pain and suffering, made by him on the same day of the homicide, whether given in the course of a medical examination or while describing his particular pain or trouble to another, are entitled to go to the jury. Such complaints may or not have probative value; but of this the jury, under the circumstances of each case, must decide." The evidence the admissibility of which was ruled upon in that case was that the accused, when seen and examined by a nonexpert at the jail on the day of the homicide, had on one side of his neck a print that looked like the print of two fingers, and that "he was complaining of being sore," that "he was just complaining of his throat being sore." It did not appear that these complaints were in the nature of involuntary exclamations, indicating pain, made in response to pressure upon the throat or otherwise; but, from the report of the testimony then in question, it merely appears that "he was just complaining of his throat being sore," and it seems to be evident that they were not made so near in point of time to the homicide as to be considered part of the *res gestæ* of the encounter which resulted in the killing. So that case, but for the above-cited older, conflicting, and necessarily

controlling decision, would be authority for holding that evidence as to complaints of present existing pain would be admissible, and the statement of the physician that the plaintiff complained of backache and pains in her hips would be prima facie admissible, such complaints apparently referring to pains existing at the time when the statements were made to the physician. But even this was not admissible under the ruling in the older case. The rest of the testimony objected to was clearly inadmissible, because it referred to statements by the plaintiff of past sensations and symptoms. It will be observed that in neither *Broyles v. Prisock* nor *Powell v. State* was any distinction made between complaints of pain and suffering made by a patient to his physician and such complaints made to any other person. In an able and instructive article on "Declarations of Pain and Suffering," in 22 *Central Law Journal*, 509, 514, the writer well says: "Nothing is better settled than the rule that, when a witness can be called by a party, that party will not be permitted to prove his unsworn declarations. That which a plaintiff can prove by his own sworn statements, being a competent witness, he is not permitted to prove by statements which are unsworn. His declarations as part of the *res gestæ* of some subject of inquiry may be proved, but otherwise they are incompetent. It is difficult to see how spoken declarations or representations of existing pain can be a part of the *res gestæ* of such pain. If the pain is not an act, they are not declarations accompanying an act. Nor can we regard such descriptive statements of present pain as the natural language of such pain. The greatest sufferers seldom say they suffer for the purpose of indicating their pain. Such declarations are not admissible merely because they accompany the act of the party in submitting himself to examination, for it is the existence of the pain, of a bodily condition or sensation, not the fact that a doctor examined the person, that is the subject inquired about. This applies equally to examinations made by physicians for the purpose of treatment, or to qualify themselves to testify as expert witnesses."

12. The conductor of the train testified in behalf of the defendant that, upon approaching the crossing where the collision occurred, the engineer of the train gave two long and two short blasts of the whistle, and, upon cross-examination, he was asked the following question: "Did you blow at all the road crossings up and down the track on that occasion?" This question was objected to by the defendant, upon the ground that it was irrelevant, and the objection was overruled by the court. The witness answered, "Yes, sir," but, upon the question being repeated, he answered that he did not know. In the motion for a new trial error was assigned upon this ruling of the court. The facts with reference to the blowing or nonblowing of the whistle of the

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locomotive of this particular train at other crossings on that day were clearly irrelevant to the issues on trial, but the plaintiff had the right, upon cross-examination, to test the recollection of the witness as to the blowing of the whistle at other crossings. It would have been perfectly competent to have asked the witness if he remembered whether the whistle was blown at all the other crossings, or to have asked if he remembered whether it was sounded at other named crossings. While it may be that the particular question propounded was in itself objectionable, the testimony which it elicited gave the defendant no legal cause to complain of the ruling of the court. The first answer to the question was favorable to the defendant, and the fact stated in the second was merely in reference to the witness's memory.

Judgment reversed. All the Justices concur.

DIXON v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington, March 4, 1905.)

[79 Pac. Rep. 943.]

Trespassers—Ejection—Authority of Brakeman—Wrongful Acts—Liability.*

A brakeman on a freight train has prima facie implied authority to eject a trespasser thereon, so that the railway company is liable for injuries sustained by such trespasser, resulting from the brakeman's improper manner of ejection, though the acts were wanton and reckless if unaccompanied by an independent malicious purpose of his own.

Same—Same—Res Gestæ.

Where a brakeman on a freight train ejected plaintiff therefrom in such a manner that he fell and his arm was run over, evidence of a statement made by plaintiff not more than five or ten minutes after the accident happened, when he was holding his arm and crying to the effect that the brakeman kicked him off the train, was admissible as *res gestæ*.

Same—Same—Hearsay Testimony.†

In an action for injuries to a trespasser by his ejection from a freight train, statements made to a witness by a stranger, who could not be found at the time of the trial, and who was in no way connected with the accident, though made at the time and place of the accident, as to how it occurred, were hearsay and inadmissible.

*As to whether it is within the implied authority of a brakeman to eject trespassers from trains, see foot-notes appended to *McKeon v. New York, etc., R. Co.* (Mass.), 8 R. R. R. 375, 31 Am. & Eng. R. Cas., N. S., 375.

As to the liability of a railroad company for the improper manner in which a trespasser is ejected from a train, see foot-notes appended to *Powell v. Erie R. Co.* (N. J.), 13 R. R. R. 615, 36 Am. & Eng. R. Cas., N. S., 615.

†For authorities in this series on the question whether statements of injured persons are *res gestæ*, see foot-note appended to *Williams v. Southern Ry.* (S. Car.), 12 R. R. R. 604, 35 Am. & Eng. R. Cas., N. S., 604, where all the preceding authorities in this series are collected.

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Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by Charles H. Dixon, a minor, by M. G. Royal, his guardian ad litem, against the Northern Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

B. S. Grosscup and A. G. Avery, for appellant.
Troy & Falknor, for respondent.

DUNBAR, J. This action was brought in behalf of one Dixon, to recover damages for the alleged wanton and willful act of a brakeman in kicking him from a moving train, resulting in injuries necessitating the amputation of his arm. Dixon was a boy about 18 years old, and was beating his way on a freight train from Portland to Tacoma, riding on the bumpers six or seven cars back from the engine. The train reached Centralia about 2 o'clock in the morning of July 3, 1903, stopped a few minutes, and then pulled out. After going two or three hundred yards from the depot, a brakeman came over the cars, and asked Dixon if he had any money, and, being told that he had none, swore at him and told him to get off. He answered that the train was going too fast, and he could not get off, and the brakeman said, "Now, you son of a b——, get off," and thereupon stepped on his fingers (Dixon was holding on the car ladder), and kicked him loose, kicking him on the head and shoulders several times. By reason of such treatment he was forced to let go of his hold on the ladder, and fell down on the track, the wheels of the car running over his arm and mangleing it so that amputation was necessary. This was the testimony of Dixon, which was denied by the trainmen, but was a question that was submitted to the discretion of the jury, and may be considered a fact established in the case. Upon trial the jury brought in a verdict for plaintiff in the sum of \$1,999.

It is assigned that the court erred (1) in denying defendant's motion for nonsuit made at the close of the testimony; (2) in denying defendant's motion for a new trial, made upon the grounds, among others, that the evidence was insufficient to justify the verdict, and that the verdict was against the law; (3) in allowing the witness Scheelke and the witness Reisinger to testify, over the objection of defendant, to statements made by plaintiff after the accident, to the effect that "that son of a b—— of a brakeman kicked him off the train"; (4) in refusing to allow the witness Shields to testify to statements made to him by a stranger, at the time and place of the accident, as to the manner in which it occurred.

The question involved in the first and second assignments, which are argued together in appellant's brief, raises the question of the responsibility of a railroad company for the wanton and willful act of a brakeman resulting in injury to a

trespasser, in the absence of evidence showing that the brakeman's act was within the scope of his employment. It is earnestly contended by the respondent, with some degree of reason, that this question cannot be raised in this court by the appellant, it not having been raised in the lower court. With the view we take of the merits of the case, it is not necessary, in the respondent's interest, to discuss this question, and we mention it only to prevent the claim which might be made in some future case, that, under the doctrine of this case, the court had retreated from the position which it has uniformly taken—that a case must be tried in this court upon the same theory on which it was tried below; but, inasmuch as the merits involve an important question, which is sure to rise at some future time, we have concluded to enter upon a discussion thereof.

Of course, there is no question but that there is a sharp distinction drawn by the authorities between passengers and trespassers on a railroad car; but the distinction is as to the duty owing by the company, and not as to tortious acts committed on either passenger or trespasser. A high degree of care on the part of the company is exacted by the law, to insure the safety of the passenger who has for a mutual consideration placed himself in the care and under the charge of the company. To this degree of care the trespasser is, of course, not entitled, for he has no contractual relation with the company, and cannot, therefore, plead, as can a passenger, that there is an implied provision in the contract that the company has employed suitable servants to run its trains. Standing as a naked trespasser, the company is not bound to consider his interests in the selection of its servants, or in the performance of its business in any way. But, notwithstanding this distinction, the law, out of regard for common humanity, will not permit a master to allow his servant to unnecessarily abuse or imperil the life or limb even of a trespasser, and if the company, through its servants, willfully injure him, it will be liable, even though he may have been guilty of contributory negligence. It is well settled generally that a railroad company is responsible in damages to a trespasser for torts committed upon him by a servant who, in the commission of the tort, is acting in the line of his employment and within the scope of his authority; not within the scope of his authority as applied to the commission of the tort, for no authority for such commission could be conferred, but within the scope of his authority to rightfully do the particular thing which he did do in a wrongful manner. And, while the master will be held liable for the willful act of the servant not done to further or protect the master's interest or with a view to the master's service, if the servant is authorized to reform the duty, but in the performance of that duty acts willfully or negligently to the detriment of another, the master will be

held liable. So that the pertinent question in this case is, was the brakeman acting within the actual or implied scope of his employment when he committed the act complained of?

Upon this question there is a great conflict of authority; many courts, as asserted by the appellant, holding that it is not within the implied authority of a brakeman to expel trespassers from the company's trains, but that their business, as their name implies, is to attend to the brakes on the cars. Many of the authorities cited by appellant, while discussing incidentally the question involved here, are based upon other principles, and are not of value in determining this question; and others, notably the text-books, simply undertake to give an expression to the general current of authority. Thus, the appellant's citation from Patterson on Railway Accident Law, that the general rule is that, in order to render the railroad liable for the act of the servant, it must also be shown that the particular act which caused the injury was within the scope of the servant's employment, is of little value, for the question here is whether the act committed was within the scope of the servant's employment impliedly. It will not be contended anywhere that the railroad would be liable if the servant was acting entirely without the actual or implied scope of authority, and upon an independent proposition not connected with the master's business. The same author, however, on page 109, after discussing this proposition and citing some cases holding in favor of appellant's contention, says: "The doctrine of most of the cases, however, is that wherever a railway servant is put in charge of any property of the railway, as a station master in charge of a station, or a conductor in charge of a train, or an engine driver or fireman in charge of an engine, or a brakeman in charge of a car, that servant is necessarily charged with the duty of protecting that particular property, and he is therefore, for that purpose, vested with an implied authority to remove trespassers therefrom; and if he makes a mistake, either by removing a person who is rightfully therein or thereon, or by using unnecessary violence in the removal of a trespasser, the railway must be held liable for all such injuries as result, in the one case from the removal, and in the other case from the unnecessary violence with which that removal is effected." It is further said, on page 110: "The doctrine of the last-mentioned class of cases seems to be sound, for, if the person who does the wrongful act be, in fact, a servant of the railway, and if the act be done in furtherance of the general purposes of the railway, and not to accomplish an independent personal purpose on the part of the servant, the railway ought to be held liable therefor, on the ground of an implied delegation to the servant of authority for the performance of the particular act. * * *

There are, however, many cases cited by the appellant

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which hold directly that a brakeman is not within the actual or implied scope of his authority or employment when ejecting a trespasser from a train. The most pointed and strongest case on this question, among others, is *Farber v. Missouri Pacific Ry. Co.*, 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350, where it was held that it cannot be assumed, in the absence of proof, that a brakeman on a freight train was authorized to remove a trespasser. And see, also, *Stringer v. Missouri Pacific Ry. Co.*, 96 Mo. 299, 9 S. W. 905; *Galaviz v. International & G. N. R. Co.* (Tex. Civ. App.) 38 S. W. 234; *Texas & Pac. Ry. Co. v. Mother* (Tex. Civ. App.) 24 S. W. 79; *Texas & Pac. Ry. Co. v. Moody* (Tex. Civ. App.) 23 S. W. 41; *Illinois Cent. R. Co. v. Latham* (Miss.) 16 South. 757; *Marion v. Chicago, etc., Ry. Co.* (Iowa) 21 N. W. 86; *Towanda Coal Co. v. Heeman*, 86 Pa. 418. There are other cases holding substantially to the same doctrine, but those above mentioned are exactly in point, being brakemen cases, and the doctrine of those cases is that it is well established, as a matter of rule and of common observation, that the conductor is in control of the cars, and that it is his duty to see that the cars are protected from trespassers; that it is the brakeman's duty to exercise this control only when he is authorized by the conductor to do so, and that, in the absence of proof of such authorization, he will not be regarded as acting within the scope of his authority.

There is, however, another line of authorities, most of which are of a more recent date, holding that it is a matter of common knowledge and observation, of which courts will take judicial notice, that it is the duty of a brakeman to exercise supervisory control over the cars, a control which includes within its limits the right to protect the cars by ejecting trespassers therefrom; and we are inclined to yield our allegiance to this doctrine. It must be evident to every one who travels on railroad trains that, while it may be true theoretically that the conductor is in charge of the cars, his special duties are more of a business character; that he looks out for the business of such train— if a passenger train, for the collection of fares and the proper exercise of the duties of the company towards passengers; if of a freight train, for the proper handling and transmission of freight, and for the direction of the movements of the train in a general way. The business of a brakeman, while it may have originally been restricted to the operation of brakes, has grown into a supervision, to a certain extent, of the cars. He meets you upon the platform when you start to enter a car, and will not permit you to enter until he individually sees to it that passengers who desire to alight from the cars have alighted, thereby preventing the confusion and jostle incident to the unrestricted egress and ingress of the passengers; and if a passenger were to insist upon disobeying his orders in this respect, and the

brakeman assaulted him sufficiently to protect the interest of the company in carrying out his orders, we have no doubt that he could successfully plead the exercise of his duties in defense of the assault, in any court in the Union. He is found looking after the doors of the cars, to see that they are open at the proper time and closed at the proper time, and the ventilation of the cars. He will be seen in the performance of his duties on the top of the cars, where this brakeman was, and it is a fact notorious that he is exercising supervisory powers over the cars. It may be that these powers have increased with the changing conditions incident to railroading, and that the observation of this increase in his powers is the cause of the change in judicial decision on this question, for it is noticeable that most of the cases holding to the theory that the brakeman is not acting within the scope of his authority or employment when ejecting a trespasser from the train were decided many years ago, while the great majority of the cases holding to the other doctrine are of very modern announcement. While this authority of which we have been speaking may not be strictly conferred upon the brakeman by the terms of the employment contract, we think that it must be a matter of common observation that such authority is an inference from the nature of the business and its actual daily exercise.

In addition to this, the rule for which the respondent contends places the burden of proof where it justly belongs, viz., upon the railroad company, which has the knowledge of its contractual relations with its servants, and can show lack of actual or implied authority or usage or custom, which would raise the presumption of implied authority, if such authority or custom does not exist in the management of its business; while the party who is injured has not the benefit of this knowledge, and can only judge of who is in authority on a railroad train by appearances. Railroad employees, as a rule, are dressed in certain garbs that distinguish them as railroad men, and when a demand is made upon a passenger, or even upon a trespasser, by one of these men so distinguished, the presumption is that he speaks with authority, and the other party has no way of determining that he does not, except at his peril. It would be an impracticable thing to ask of a person, when a demand is made upon him by a brakeman, in regard to something which was connected with the business of the operation of the train, that he should go the length of a train to find a conductor to ask him if the employee with whom he was in controversy had authority to make the demands which he was making. So that no injustice can be done the railroad company in holding, as many of the cases do hold, that in case of a brakeman ejecting passengers, whether trespassers or otherwise, the burden is upon the railroad company to show lack of actual or implied authority.

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Sustaining this view of the law, the respondent cites many authorities, among which is Baldwin's American Railroad Law, p. 254, where the rule, under the title "Brakemen," is thus tersely stated: "It is prima facie within the implied authority of a brakeman, whether on a passenger or a freight train, to put off any person who is found upon it without right; and if he does this at an improper place or in an improper manner, whereby such person is unnecessarily injured, the company is liable, even if the act were wanton and reckless, provided it were not done to accomplish an independent, malicious purpose of his own." This is a new work, issued in 1904.

In *Smith v. Railroad Co.*, 95 Ky. 11, 23 S. W. 652, 22 L. R. A. 72, it was held that a brakeman on a railroad train, as well as the conductor, is conclusively presumed to have authority to eject trespassers or intruders, and, if he uses unnecessary violence in doing so, the company is responsible for the injury resulting. And in that case it is said: "The implied authority in such a case is an inference from the nature of the business, and its actual daily exercise, according to common observation and experience."

In *Hoffman v. N. Y. Cent., etc., R. Co.*, 87 N. Y. 25, 41 Am. Rep. 337, it is held that the conductor of, or a brakeman upon, a railroad passenger train, has authority to remove, in a lawful manner, a trespasser upon the platform of a car, whether the authority is conferred by the rules of the company or not; it is implied and is incident to his position. It is within the scope of the general authority of a brakeman on a freight train to prevent trespassers from getting on the train, and to remove such persons who wrongfully get thereon; but if, in so doing, he does not exercise care and caution, but act wantonly or maliciously, and an injury results, the railroad company is liable. *Kansas City, etc., R. Co. v. Kelley* (Kan.) 14 Pac. 172, 59 Am. Rep. 596.

In *Lang v. Railroad Co.*, 51 Hun, 603, 4 N. Y. Supp. 565, a case where a boy without authority got upon a train, and the brakeman told him to get off, the boy refused to do so, and the brakeman threw a lump of coal on the top of the car, which struck the boy on the head, whereupon he fell from the car under the wheels, and lost his foot, it was held that the brakeman was engaged in the master's business and acting within the general scope of the authority conferred upon him. In the opinion it is said: "It is not necessary to show specific order to the brakeman, by the master, to drive off boys who were 'stealing a ride.' The brakeman was engaged in the master's business, and acting within the general scope of the authority. * * * The brakeman was apparently engaged for the defendant, and clearly was not pursuing his own purpose. * * *" "It is within the scope of the implied authority of a brakeman in charge of a freight train to

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eject trespassers therefrom." *O'Banion v. Railway Co.*, 65 Kan. 352, 69 Pac. 353.

In *McKeon v. Railroad Co.*, 183 Mass. 271, 67 N. E. 329, 97 Am. St. Rep. 437, a case decided November 18, 1902, it was held that a railroad company is liable to a boy who, when stealing a ride on the front platform of the baggage car of a passenger train, is recklessly pushed from the car by a brakeman of the company while the train is in motion, and is injured by falling under it; that it is within the scope of the authority of a brakeman on a passenger train to remove, in a lawful manner, from the platform of a baggage car, one who is riding there for the purpose of evading his fare. In the course of the opinion it is said: "A conductor has implied authority, by virtue of his employment, to eject a trespasser from the train under his control. [Citing *Ramsden v. Boston & A. R. Co.*, 104 Mass. 117, 6 Am. Rep. 200, and cases cited.] An engineer would probably have like authority to eject a trespasser from his engine. A brakeman has less authority than either. His duties primarily relate, as his name implies, to the management of the brakes. But common observation shows that on passenger trains they embrace much more, and that, so far as the management of the brakes on such trains is concerned, their duties have been largely superseded by the appliances in use. On passenger trains brakemen are required to look after the safety and comfort of the passengers, to protect the property of the company, and to see that fares are not evaded. The rules of the defendant company as well as common observation show this. And while the brakeman in question was not in any just sense a conductor or even a subconductor, we think that the jury were warranted in finding, as they must have found under the instructions of the judge, that it was within the scope of his authority to remove the plaintiff in a lawful manner from the platform if he was there for the purpose of evading his fare."

In *Hill v. Baltimore, etc., Ry. Co.* (Sup.) 78 N. Y. Supp. 134, decided October 10, 1902, it was held that, where a brakeman on a railroad train, in order to eject one stealing a ride, uses an unreasonable method, calculated to increase the trespasser's danger, and such action is the proximate cause of an injury, the railroad is liable. To the same effect are *Chesapeake & O. R. Co. v. Anderson*, 9 Am. & Eng. Railroad Cases, 136; *Johnson v. Chicago, etc., Ry. Co.* (Iowa) 88 N. W. 811; *Bjornquist v. Boston & A. R. Co.* (Mass.) 70 N. E. 53; *Johnson v. Chicago, etc., Ry. Co.* (Iowa) 98 N. W. 642, a case decided February 20, 1904; and many other cases too numerous to mention.

The testimony complained of in assignment No. 3, viz., that of the witness Scheelke and the witness Reisinger, to statements made by the plaintiff after the accident, to the effect that the brakeman kicked him off the train, we think was plainly admissible under the doctrine of *res gestæ*;

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that it was a spontaneous, impulsive statement of fact, while the boy was suffering intense and excruciating pain and under the excitement of the accident, when the natural prompting would be to speak the truth. The testimony was to the effect that they heard somebody crying for help; that they ran down and found Dixon alone, holding his arm and crying; that it was between five and ten minutes after the accident occurred, and that, when asked what had happened, the answer above stated was given. This, we think, was sustained under the rule announced by this court in *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111, and *Lambert v. Transportation Co.*, 30 Wash. 346, 70 Pac. 960.

It is also urged by the appellant that, if the court was warranted in admitting as a part of the *res gestæ* the testimony of these two witnesses, it committed error in refusing to allow the witness Shields to testify to statements made to him by a stranger, at the time and place of the accident, as to the manner in which it occurred. But we think the court did not abuse its discretion in this respect. There is no showing that the stranger, who was not able to be found at the trial, was in any way connected with the accident or prompted by any circumstances to speak the truth in regard to it, and under the circumstances it seems to us that it would simply be the admission of hearsay testimony.

There being no error discoverable in the record, the judgment is affirmed.

MOUNT, C. J., and HADLEY and FULLERTON, JJ., concur.

INDIANAPOLIS ST. RY. CO. *v.* SCHOMBERG.

(Supreme Court of Indiana, Jan. 12, 1905.)

[72 N. E. Rep. 1041.]

Child Killed on Street Car Track—Degree of Care Required of Motor-man.*

In an action for the death of a young child by being run over by a street car, an instruction that in such a case the motorman "must make sure" that the child will be free of the track at the point where it is crossing or approaching the track, before the car reaches him, was objectionable, as requiring too high a degree of care; the railroad company not being an insurer of the child's safety.

Harmless Error.

Where, in an action for the killing of a child in collision with a street car, the uncontradicted evidence clearly established that the verdict was

*As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-note appended to *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91; *Anniston Elec. & Gas Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312; *Forrestal v. Milwaukee Elec. Ry. & Light Co.* (Wis.), 11 R. R. R. 814, 34 Am. & Eng. R. Cas., N. S., 814; *Warner v. St. Louis & M. R. R. Co.* (Mo.), 11 R. R. R. 809, 34 Am. & Eng. R. Cas., N. S., 809; *North Chicago St. R. Co. v. Johnson*

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right, and that the merits of the cause had been fairly tried, a judgment on such verdict will not be reversed because of an erroneous instruction, under Burns' Ann. St. 1901, § 670, forbidding reversal where it appears to the court that the merits of the cause have been fairly tried and determined in the trial court.

Care Required of Child.†

Where a child killed in collision with a street car was non sui juris, it was only required to exercise such care as could be reasonably be expected of a child of its age and intelligence.

Negligence in Not Stopping Car When Child Was Seen Approaching Track.

In an action against a street railway company for killing a child on the track, evidence held to establish the motorman's negligence in not stopping the car when he first saw the child in the roadway, going toward the track.

Appeal from Circuit Court, Johnson County; W. J. Buckingham, Judge.

Action by William L. Schomberg against the Indianapolis Street Railway Company. From a judgment in favor of plaintiff, defendant appeals. Case transferred from the Appellate Court, as authorized by Burns' Ann. St. 1901, § 1337j, cl. 2. Affirmed.

F. Winter, Miller & Barnett, and W. H. Latta, for appellant.

W. W. Thornton, Ayres, Jones & Hollett, and Wm. A. Johnson, for appellee.

JORDAN, J. Appellee instituted this action against appellant to recover damages for the negligent killing of his minor child. The child, it appears, was killed at a point on Alabama street, in the city of Indianapolis, by being run over by one of appellant's cars. The complaint upon which the cause was tried contained five paragraphs. Briefly stated, the first paragraph, among other things, after disclosing that

(Ill.), 11 R. R. R. 774, 34 Am. & Eng. R. Cas., N. S., 774; *South Covington & C. St. Ry. Co. v. McHugh* (Ky.), 11 R. R. R. 760, 34 Am. & Eng. R. Cas., N. S., 760; *Haas v. New Orleans Rys. Co.* (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442; *Cocassens v. Rapid Ry. Co.* (Mich.), 11 R. R. R. 382, 34 Am. & Eng. R. Cas., N. S., 382; *Jett v. Central Elec. Ry. Co.* (Mo.), 11 R. R. R. 227, 34 Am. & Eng. R. Cas., N. S., 227; *Cameron v. Jersey City, etc., Ry. Co.* (N. J.), 11 R. R. R. 226, 34 Am. & Eng. R. Cas., N. S., 226; *Chicago Union Traction Co. v. Browdy* (Ill.), 10 R. R. R. 68, 33 Am. & Eng. R. Cas., N. S., 68; *Hayden v. Fair Haven & W. R. Co.* (Conn.), 10 R. R. R. 32, 33 Am. & Eng. R. Cas., N. S., 32; foot-note appended to *Louisville & N. R. Co. v. Logsdon's Adm'r* (Ky.), 12 R. R. R. 637, 35 Am. & Eng. R. Cas., N. S., 637.

†As to the care required of children for their own protection, see foot-note appended to *Heinzle v. Metropolitan St. Ry. Co.* (Md.), 13 R. R. R. 107, 36 Am. & Eng. R. Cas., N. S., 107; foot-note appended to *Poland v. Union R. Co.* (R. I.), 12 R. R. R. 648, 35 Am. & Eng. R. Cas., N. S., 648; *Cleveland, etc., Ry. Co. v. Miles* (Ind.), 11 R. R. R. 536, 34 Am. & Eng. R. Cas., N. S., 536; *Di Prisco v. Wilmington City Ry. Co.* (Del.), 11 R. R. R. 478, 34 Am. & Eng. R. Cas., N. S., 478; *Anderson v. Central R. Co. of New Jersey* (N. J.), 7 R. R. R. 51, 30 Am. & Eng. R. Cas., N. S., 51; *Dubiver v. City & S. Ry. Co.* (Ore.), 10 R. R. R. 660, 33 Am. & Eng. R. Cas., N. S., 660.

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appellee was the father of the child, named Allen Schomberg, of the age of three years, charges, in general terms, negligence on the part of appellant company in running the car in question over the child, thereby killing it. The second paragraph charges negligence against appellant because the motorman in charge of the car failed to look and see the child. The third alleges that the car was old, and that the brake thereof was defective, and in such condition that the motorman was unable to stop the car in time to prevent the accident. The fourth alleges that the car was negligently constructed, and the life guard thereof was defective, and by reason thereof the child, after it was struck by the car, passed over the life guard under the car. The fifth alleges that appellant did not comply with the provisions of an ordinance passed by the city of Indianapolis, which required it to use the most improved pattern of cars, and to keep them in good repair, and to provide them with the most improved life guards, etc. Appellant's answer to the complaint was the general denial. The case was venued to the Johnson circuit court, where a trial by jury upon the issues joined resulted in a verdict in favor of appellee for \$1,350. Appellant's motion for a new trial, assigning as reasons, among others, that the court erred in giving and refusing certain instructions, was denied, and judgment was rendered on the verdict. The evidence is in the record by a bill of exceptions. The only questions discussed and relied upon for a reversal by appellant relate to instructions given and refused.

By reason of the conclusion reached, we do not deem it necessary to set out the instructions of which appellant complains. We have examined the entire charge of the court, however, and, in the main, at least, it may be said that the jury thereby was fairly advised relative to the law applicable to the case at bar. Some of the instructions criticised by appellant's counsel contain inaccurate expressions of law. Especially is this true of instruction 32, in the use of the term "sure." By this charge the court advised the jury in regard to the general rule controlling rights of persons in the use of the streets of the city, and as to the duty resting on a street railway company in respect to persons using the streets over which its cars were running. In the closing part of the instruction in question, the court said: "In the case of a young child, the motorman or person controlling the movement of such car must make *sure* that the child will be free of the track at the point where it is crossing or approaching such track, before the car reaches him." (Our italics.) There is merit in the contention of counsel that appellant could not in this case be held to be an insurer of the safety of the child. Instruction 42, and possibly some others criticised by appellant, may be said to be open to its objection that they assume that a certain fact or facts mentioned in the instruction had been established. If we had any reason to

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believe, from an examination of the record, that the inaccuracies in the instructions in question were influential in bringing about a wrong result, or were probably prejudicial to appellant, we would not hesitate to order a reversal of the judgment. But what may be said to be the uncontradicted evidence in the case clearly establishes that the verdict of the jury is right, and that the merits of the cause have been fairly tried and determined. It has been frequently affirmed by this court that the giving of an inaccurate instruction, which, under the facts in the case, cannot be said to have prejudiced the complaining party in his substantial rights, will not justify a reversal of the judgment. Neither will an erroneous instruction warrant a reversal where it appears that the judgment, upon the evidence, is a correct result. In fact, section 670, Burns' Ann. St. 1901, forbids a reversal in cases "where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." The decisions in which this rule is sustained and enforced are numerous, and a reference to all is not necessary. See *Stanley v. Dunn*, 143 Ind. 495, 42 N. E. 908; *Mode v. Beasley*, 143 Ind. 334, 42 N. E. 727; *Swain v. Swain*, 134 Ind. 596, 33 N. E. 792; *Badger v. Merry*, 139 Ind. 631, 39 N. E. 309; *Elliott's App. Proc.* §§ 292, 632, 635, 643, and authorities there cited.

What may be said to be the undisputed evidence in the case discloses the following facts: Appellee was the father of the child in question, which at the time of the fatal accident was two years and eight months old. Appellee's family consisted of his wife and two children, and their home was situated on Alabama street, which runs north and south, in the city of Indianapolis. The width of the roadway of this street opposite appellee's home is shown to be 36 feet. The distance from the north property line of appellee's lot to the corner of Massachusetts avenue is 250 feet. The accident occurred about 11 o'clock a. m. on April 8, 1900. Appellee at that time was absent from home. The child was at home with its mother, who testified that, just before the accident occurred, it, together with its older brother, had gone out on the front porch, which faces Alabama street. She could see the children, where they were playing on the porch, from the sitting room. She testified that she left the sitting room and went into her kitchen to look after some work, and was there about five minutes, when she heard the child scream. She ran out onto the street, where the car had stopped, and discovered that her child had been run over by the car, and from the effects of its injury it died about 3 o'clock on the following morning. The car which struck it belonged to the Central avenue line of appellant's railway, and at the time of the accident was running north. Aside from the evidence of eyewitnesses who testified in behalf of appellee relative to the accident, which evidence clearly establishes negligence

on the part of the motorman who was operating the car, that introduced in behalf of appellant alone clearly proves the fact that the death of the child was due to the negligence of the motorman. It appears that the motorman operating the car at the time of the accident had no regular run. He was simply being used as a substitute for another. It is shown that there is a switch on Massachusetts avenue, by the means of which the cars of the Central avenue line of appellant's road are turned onto Alabama street. The testimony of the motorman, together with that of other witnesses, discloses that when the cars turn from the avenue onto Alabama street the view ahead towards the north is unobstructed. It appears that, had the motorman looked ahead of his car as it entered onto Alabama street, he could have seen the child in the roadway, about 90 feet beyond the car; that at that time it was between the curb and the tracks of the railway, about 15 feet from the tracks. It was walking towards the tracks. In fact, the motorman testified that there was nothing to prevent him from seeing the child when his car entered from Massachusetts avenue onto Alabama street. He testified that just as the car entered onto Alabama street he saw the child ahead of the car; that it was about halfway between the curb and the track, and about 15 feet from the track, towards which it was then going. He states himself that it was at that time about 75 feet beyond the car. He testified that when he first saw the child going towards the track he rang the gong in order to attract its attention, and after it had entered onto the track, and when the car was within 10 feet of it, he reversed the power and tried to stop the car. When he first saw the child, as he states, the car was running at full speed, but was running slowly at the time when it struck and ran over the child. The child, by reason of its tender age, was, in the eye of the law, non sui juris, and was incapable of being guilty of contributory negligence. It would be required to exercise only such care and discretion as could be reasonably expected of a child of its age and intelligence. *Elwood St. R. Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535, and cases there cited. The motorman's own testimony establishes that he was guilty of negligence in not stopping his car, as it is shown he could when he first saw the child in the roadway, going toward the tracks. Instead of endeavoring to stop the car, he sounded the gong in order to attract the child's attention. It was not until within 10 feet of the child—virtually upon it—did he endeavor to stop the car and thereby prevent the accident. It was clearly his duty at the time he first saw the child approaching, as it was, a place of danger, to have at least made a proper effort to control the car so as to stop it before it reached the child. It is evident that, had he done so, the car could have been stopped, and the fatal accident avoided. Under the circumstances, the motorman had no right to assume that this little boy would

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exercise the care of older persons, and would not enter onto the track as the car was approaching. He ought to, under the circumstances, have acted on the belief or presumption that the child might go onto the track, and should therefore have immediately endeavored, by the use of proper means, to have controlled the car. *Indianapolis St. R. Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387, and authorities there cited; *Elwood St. R. Co. v. Ross*, supra; *Sample, Adm'r, v. Consolidated L. & R. Co.*, 50 W. Va. 472, 40 S. E. 597, 694, 57 L. R. A. 186; *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274; 2 Thompson on Neg. (New Ed.) § 1424.

There is no evidence in the case which can be said to impute contributory negligence either to appellee or his wife. *Sample, Adm'r, v. Consolidated L. & R. Co.*, supra, and cases there cited.

Judgment affirmed.

CAMERON v. DULUTH-SUPERIOR TRACTION CO.

(Supreme Court of Minnesota, Jan. 20, 1905.)

[102 N. W. Rep. 208.]

Child Injured on Street Car Track—Contributory Negligence—Crossing Tracks in Front of Approaching Car—Negligence—Speed—Failure of Motorman to Anticipate Injury to Child Approaching Track.*

The evidence was sufficient to sustain the findings of the jury with reference to the following issues, which were properly submitted by the trial court: That the parents of the child were not guilty of negligence in intrusting the child to the care of an older sister; that the children were not guilty of contributory negligence in attempting to cross the street railway tracks in front of an approaching car; that the motoneer of the car was guilty of negligence in not attempting to slacken the speed of his car, and get it under control, in anticipation of injury to the children who were approaching the tracks.

Instructions.

The court did not err in refusing to instruct the jury that the motoneer was not guilty of wanton or willful negligence, inasmuch as the cause was not tried upon that theory, and such issue was not submitted to the jury by the court.

Evidence.

It was not error for the court to permit a certain witness to testify with

*For illustrations showing whether children were, or were not, guilty of contributory negligence, see foot-note appended to *Poland v. Union R. Co.* (R. I.), 12 R. R. R. 648, 35 Am. & Eng. R. Cas., N. S., 648; *Jett v. Central Elec. Ry. Co.* (Mo.), 11 R. R. R. 227, 34 Am. & Eng. R. Cas., N. S., 227 (girl eleven years old and boy of about nine, in walking on street railway track without looking for cars, were guilty of contributory negligence).

As to what is contributory negligence of parents, in action for injuries to children, see foot-notes appended to *St. Louis, I. M. & S. Ry. Co. v. Colum* (Ark.), 11 R. R. R. 807, 34 Am. & Eng. R. Cas., N. S., 807.

As to the care required of those in charge of street cars to avoid collisions with other users of streets, see preceding case and foot-notes.

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reference to the speed of the car, for the reason that proper objection was not made, and the answer was not stricken out.

Excessive Verdict.

A verdict of \$2,000 was not excessive, considering the age of the boy and the nature of his injuries.

(Syllabus by the Court.)

Appeal from District Court, St. Louis County; Homer B. Dibell, Judge.

Action by John Cameron against the Duluth-Superior Traction Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

Thos. S. Wood, for appellant.

John Jenswold, Jr., for respondent.

LEWIS, J. Defendant company operated a street railway system in Duluth. East Fourth street is about 66 feet wide, and defendant's tracks are laid upon the northerly side thereof, leaving the southerly side for a driveway. The northerly of the two tracks is adjacent to the curb upon the north side of the street, and is used for cars running towards the city, while the southerly track is for cars running from the city; the distance between the two tracks being about 9 feet. At a point upon the southerly side of Fourth street, between Twelfth and Thirteenth Avenues East, is located the Hartnett store; and on the opposite side of the street, a little to the west, about midway in the block, is another small store. Plaintiff's infant son, aged 4 years and 7 months, left the family residence, at Sixteenth Avenue East and Fourth street, in charge of a sister 11 years old, and also accompanied by a younger brother, 3½ years of age; the children having been sent by the mother to the Hartnett store to make a purchase. They reached the store, made the purchase, and, while crossing the street in a diagonal direction to the other store, William ran in front of an approaching car from the east, and was injured. The trial below resulted in a verdict for plaintiff, and defendant appealed from an order denying a motion for a new trial. The court submitted to the jury all of the issues presented at the trial: Were the parents guilty of negligence in sending the children to the store in charge of an 11 year old sister? Were the children guilty of contributory negligence? And was defendant guilty of negligence in the operation of its car, under the circumstances of the case?

1. The evidence is sufficient to sustain the holding of the jury in respect to each of these propositions. The little girl was the oldest child in the family, and had frequently taken charge of the younger children in going to and from school and other places; and in this respect it does not appear, as a matter of law, that the parents were guilty of negligence in thus intrusting the child to the sister's care. There was evidence tending to show that at the time in question the children came out of the Hartnett store, intending to cross the

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street diagonally to the other store; that the boy William ran ahead of the other children; that the sister started after him, and endeavored to catch hold of him, but he, oblivious to any danger, ran in front of the car, and was caught upon the fender, but rolled off under the car, and was injured. Considering the circumstances, the age of the boy, and the evident purpose of the sister to keep control of him, they were not, as a matter of law, guilty of contributory negligence. As to the negligence of those in charge of the car, the evidence shows that the place where the boy was struck was about 290 feet westerly from Thirteenth Avenue; that the car did not stop at Thirteenth avenue, and was traveling at the ordinary rate of speed in that locality—about 12 or 15 miles an hour. As the boy approached the southerly track, closely followed by his sister, leading the younger brother, the car was just passing Thirteenth avenue, and the boy was in plain sight of the motoneer and certain witnesses standing beside him, and others in the car and at the front of the store. According to the evidence of these people, the position of the boy was seen, and the possibility of danger to him apprehended, for they called out to attract the child's attention; and the motoneer distinctly saw the children as he passed Thirteenth avenue, and made the remark, "I wonder if those kids will cross the track." Notwithstanding the speed at which the car was going, the motorman made no effort to stop the car and avoid the possibility of an accident until he was within 12 or 15 feet of the place where the boy might cross the track, when suddenly the child stepped in front of the car, the motorman reversed the electric current, dropped the fender, and caught the boy; but, before the car could be brought to a standstill, he rolled off the fender, under the car, and was injured. The position of the boy in advance of the other children, and the fact that they were going in a well-known direction, were sufficient to put the motoneer upon his guard, and to require him to control the speed of his car in order to prevent a possible accident. At least, it was a question for the determination of the jury whether, under those circumstances, the motoneer was guilty of negligence in failing to get his car under control in anticipation of a collision at a point where the children might cross the track if they did not notice the approaching car. There are no new principles of law involved in this case. The question of the amount of care required for those in charge of street cars—motormen and conductors—is discussed fully in *Strutzel v. St. Paul City Ry. Co.*, 47 Minn. 543, 50 N. W. 690, and *Gray v. St. Paul City Ry. Co.*, 87 Minn. 280, 91 N. W. 1106.

2. Although the complaint alleged that the motorman wantonly failed to stop the car in time to avoid the accident, the case was not tried upon that theory; and the court submitted the case to the jury entirely upon the proposition of a failure to exercise ordinary care on the part of defendant, and

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upon the question of contributory negligence on the part of plaintiffs. This was equivalent to informing the jury that the question of wanton or reckless conduct on the part of the motoneer was not in the case, and hence it was not error to refuse a specific instruction upon that point at the request of defendant.

3. It was not error for the court to refuse to receive in evidence a certain ordinance of the city permitting cars to run at the rate of 20 miles an hour upon the street in question. In the first place, there was not sufficient evidence that the ordinance was in force at the time of the accident; and also it was immaterial for the reason that the charge of negligence against defendant was not in running its car at an unlawful rate of speed, but, under the circumstances, in running it in a negligent and careless manner.

4. Error is assigned for permitting a witness to testify that the car was running from 14 to 15 miles an hour, upon the ground that no proper foundation had been laid. The objection did not go to the question as finally answered, and no motion was made to strike the answer out.

5. The verdict of \$2,000 was not excessive. The child received a severe scalp wound, and his limb was fractured, and, according to the testimony of the physician, although perfectly healed, the limb was shortened at least half an inch, and the boy is compelled to wear an extra thick sole and heel on his shoe to overcome the tendency of curvature of the spine. Considering the effect such a burden must necessarily have upon the life of a child, and the probability of the permanency of the injury, it cannot be said that the verdict was too large.

Order affirmed.

KENNEDY v. CONSOLIDATED TRACTION CO.

(Supreme Court of Pennsylvania, Dec. 31, 1904.)

[59 Atl. Rep. 1005.]

Street Railroad—Collision with Wagon—Evidence.*

In an action against a street railway company for injuries received by a collision between a car and a wagon, evidence *held* to sustain judgment for plaintiff.

Appeal from Court of Common Pleas, Allegheny County. Action by Luther Kennedy against the Consolidated Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and THOMPSON, JJ.

James C. Gray, Clarence Burleigh, and William A. Challenger, for appellant.

Rody P. Marshall, for appellee.

*See preceding case and foot-notes.

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POTTER, J. Just before the accident which resulted in the injuries for which he here seeks to recover damages, Luther Kennedy drove a team of horses and an empty wagon north on Magee street to its intersection with Fifth avenue, in the city of Pittsburg. The streets in this vicinity, running north and south, do not cross Fifth avenue, but terminate there. Magee street ends at a point about half way between Logan street and Elm street, being approximately 140 feet from each, they being the nearest highways upon either side which lead north from Fifth avenue. The defendant company has two tracks upon Fifth avenue. As the plaintiff came out of Magee street, he checked his team and looked both ways. He says he could see plainly to the east beyond Logan street, and that he saw no car within that space. A funeral procession was approaching upon the east-bound track, which was the one nearest him. He drove across this track, and turned to the west, driving diagonally across the street, and then at a point about 40 or 50 feet west of the line of Magee street his wagon was struck upon the right side, near the front wheel, by a west-bound car.

Upon the trial, in the court below, the learned trial judge refused to affirm a point put by defendant's counsel, asking for binding instructions in its favor, and this refusal is the only assignment of error presented upon this appeal. An examination of the evidence shows that there was a disputed question of fact in the case, and that was as to the location of the car when the plaintiff drove upon the west-bound track, or gave such unmistakable evidence that he was about to do so, as to put the motorman fairly upon notice that he must stop, or at least check, his car. This was not the case of a right-angle street crossing, where the driver goes straight across the street, so directly in front of and so near to an approaching car that the motorman cannot reasonably stop in time to avoid a collision. It is not, therefore, controlled by the principle of *Carson v. Federal St., etc., Ry. Co.*, 147 Pa. 219, 23 Atl. 369, 15 L. R. A. 257, 30 Am. St. Rep. 727, and other similar cases. On the contrary, the evidence all goes to show that the plaintiff was not even opposite the mouth of Magee street when struck, but had turned to the west, and had reached a point some 50 feet from the line of Magee street; and that he was at the time driving diagonally across the street. The witness Grandison testified that he saw plaintiff come out of Magee street, check his team, look east and west, and cross the track a little below; that as he came out of Magee street the car was above Logan street, coming from the east, on the west-bound track. This witness thinks the front of the team and tongue of the wagon had entered upon the line of the west-bound track while the car was yet up at or near Logan street; that the car came on down without slackening speed, and collided with the wagon about three doors below Magee street, and opposite a lunchroom located there. Another witness (Meyers), who was standing at the

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corner of Logan and Fifth avenue, testified that when the car passed him at that point the horses were about to cross into the west-bound track, down below Magee street. Three other witnesses also testified to the effect that the car was yet above Logan street when the horses were stepping into the west-bound track. The plaintiff, Kennedy, testified that he had turned his horses so that one was walking between the rails of the west-bound track and one was between the line of the two tracks when the wagon was struck. This statement would approximate the circumstances of the accident more nearly to those of a rear-end collision than to those of a crossing case. If the testimony of the witnesses for the plaintiff was credited by the jury, it was sufficient to justify a verdict for him, for the measurements show that Logan street is about 160 feet from the point where the collision occurred, and, if the motorman had been on the alert, he would have had notice during that space that a collision was likely to occur unless he checked his car. The distance was ample to permit him to stop the car if it had been under proper control. The conductor testified that at the ordinary rate of speed the car could have stopped in but little more than its own length. On the other hand, the witnesses for the defendant testified that the car was running at about the ordinary rate of speed, and that the plaintiff turned out of Magee street when the car was so near that the motorman could not reasonably stop in time. At least this was the only reasonable inference to be drawn from their evidence. Some of them said the car was not more than from 30 to 50 feet away when the team was turned into the west-bound track. But because the testimony was thus conflicting the trial judge was obliged to submit it to the jury. If the evidence on the part of the defendant was true, the plaintiff was guilty of gross contributory negligence, and could not recover. But if the story as told by the plaintiff and his witnesses was believed, then the motorman was at fault in failing to control his car, and the plaintiff did nothing more in his attempted occupancy of the track than he had the right to do. The case turns entirely upon the question of fact as to the distance between the car and the team when the first approach to the west-bound track was made, and when the motorman could be fairly said to have had notice that his track would not be clear. The circumstances were somewhat unusual. The fact that a funeral procession was approaching upon the east-bound track made it necessary for the plaintiff to pull over to the west-bound track, or into the space between it and the north curb. This accounted for the fact that the plaintiff pursued a diagonal course in crossing the street. Upon consideration of all the evidence, we think the question was one for the jury.

The assignment of error is overruled, and the judgment is affirmed.

MARTIN v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina, Sept. 29, 1904.)

[48 S. E. Rep. 616.]

Trial—Exclusion of Evidence.

Where irrelevant allegations are allowed to remain in a pleading, a party has no right to a ruling excluding the evidence, though the court has the power to exclude it.

Instructions.

In the absence of request, failure to instruct the jury not to consider evidence admitted on irrelevant allegations in the pleading is not error. **Contract to Build Spur Track to Plaintiff's Mill—Breach—Elements of Damages.**

Plaintiff moved a brickmill to a new location on the agreement of defendant to build a spur track to such location. On failure of the defendant so to do, plaintiff treated the contract as abandoned, and moved his mill back to the old location, and sued for damages: *held*, that the measure of damages was not simply the cost of hauling the product of plaintiff's mill after its return to its old location to the station on defendant's line, but defendant was also liable for the rental value of the mill during the time it was idle pending the removal to the new location and the subsequent return to the original location, and the actual expenses and losses incident thereto, together with the cost of transporting the product of the mill to the nearest railroad station.

Appeal from Common Pleas Circuit Court of Lexington County; F. B. Gary, Special Judge.

Action by Thomas L. Martin against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

Lyles & McMahan and Eford & Dreher, for appellant.
G. T. Graham and A. D. Martin, for respondent.

WOODS, J. This is an action to recover damages for breach of contract. The plaintiff was the owner of a brickmill at Arthur's Lake, in Lexington county, about one mile from Dixiana, a station on defendant's railroad. Wishing to move his mill to the railroad, in order to save the expense of hauling brick, plaintiff contracted with the defendant railway company for a spur track at a point on the railroad about three-fourths of a mile from Dixiana. The contract provided, as a condition precedent to the construction of the spur, that plaintiff should furnish the switch ties, grade the roadbed, and pay \$60 in cash. On the faith of the contract, the plaintiff moved his plant to the new location, at considerable expense. The spur was not built, and, after waiting some time, plaintiff moved his mill back to Arthur's Lake, and sued for damages. The defendant admitted the \$60 had been paid and not returned, but attempted to justify its failure to build the spur track by proving that plaintiff had not furnished cross-ties suitable for the work, or made an adequate roadbed.

The complaint sets up these items of damage:

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Expense of moving brick plant from Arthur's Lake and back..	\$550 00
Cross-ties, grading, and \$60 cash, as required by contract.....	100 00
Loss on kiln of brick for lack of spur track—difference between \$250, value on railroad, and \$97.50, price received.....	152 50
Rental value of plant while idle for six weeks, based on anticipated profits.....	2,400 00
Total	\$3,202 50

Undoubtedly the allegations as to several of these items would have been stricken out of the complaint if a motion to that end had been made. But as no such motion was made, the defendant's first exception, charging reversible error in the admission of testimony concerning them, cannot be sustained. *Ragsdale v. Railway Co.*, 60 S. C. 381, 38 S. E. 609; *Dent v. R. R.*, 61 S. C. 329, 39 S. E. 527. The Code of Procedure provides opportunity for the parties to a suit to have the real issues presented in distinct and clear-cut form by a motion to strike out irrelevant matter. If they choose not to use this means, complaint that the circuit judge failed, in the hearing of the testimony, to disentangle the confusion of relevant and irrelevant matter, will not be heeded. Justice does not, in such circumstances, require that litigation should be prolonged by new trials. On the other hand, due administration of the law and dispatch of public business are promoted by encouraging the use of the proper means to eliminate all irrelevant matter before the trial begins. It is upon these reasons that the cases above cited rest. It may be important to remark in this connection, however, that, while a party cannot complain of the admission of testimony as to irrelevant allegations he has allowed to remain in the complaint, this court has never held that the circuit court has not the right to exclude such testimony. In all the cases on the subject, the refusal to grant a new trial was placed on the ground that the appellant, having failed to move to strike out irrelevant allegations, had no right to have the testimony as to such allegations excluded. The proposition that a court is obliged to receive evidence which does not tend to establish any fact from which, under the pleadings, a legal conclusion would result, merely because the immediate litigants are not in a position to complain, cannot for a moment be entertained. The court is vested with power to exclude such evidence, in the interests of the litigants and of the public. Those who have a cause on trial are entitled to time and opportunity to present the evidence and arguments which bear upon the real issue, but, when either party attempts to go beyond this, it is within the power of the trial judge, and a duty he owes to others having business in the court, and to the public, either upon the objections of the other party, or of his own motion, to require adherence to the true controversy. The failure of the circuit judge to instruct the jury not to consider the objectionable items of damage cannot avail the

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defendant, because no specific request upon the subject was submitted and refused. The first exception is overruled.

At the close of plaintiff's testimony, the defendant requested the court to instruct the jury to find a verdict for the plaintiff for \$16 only—the cost of hauling to Dixiana all the brick plaintiff actually shipped. In his second exception, defendant submits that this request was erroneously refused. Appellant's argument is that the sole advantage plaintiff would have derived from the spur track was the saving of the cost of hauling the brick to the railroad, and hence his damage was limited to the cost of hauling actually paid. Even if the business at the new location had been abandoned for some reason not connected with defendant's breach of contract—such, for example, as the destruction of the machinery by explosion—this argument still would not be conclusive, for the advantage plaintiff would have derived from the performance of the contract would have been the saving of the cost of hauling to the railroad all the brick manufactured for market at the new location, and not merely of those actually hauled. In that event, the verdict should have been for \$50, the cost of hauling the 50,000 brick actually manufactured, and not \$16, the cost of hauling those actually shipped. But this was not the case. The plaintiff treated the breach as final and conclusive, and, on account of the breach, as he testified, moved his mill away from the location at which he would have been benefited by the building of the spur track. It is always a question of fact for the jury to decide whether, in view of the circumstances of the particular case, the breach should be regarded final and conclusive, justifying the injured party in treating the contract at an end, or only a temporary delay in performance, or other default not vital to the interests involved. *Remelee v. Hall* (Vt.) 76 Am. Dec. 140. If the plaintiff had continued business at the new location, notwithstanding defendant's alleged default, and the evidence had led the jury to conclude there was not a final and complete breach, but only a postponement of performance, resulting in no permanent and continuing loss, then the recovery should have been for only \$16—the cost of hauling the brick actually shipped. But if in that case the evidence had led to the conclusion that the breach was final and complete, the proper verdict would have been not only for hauling up to the time of the trial, but for the prospective future expense which would have been incurred on that account. 3 *Parsons on Contracts*, 200; 7 A. & E. Ency. Law, 133. Practically, this item of future expense, in such case, would be expressed by the jury's estimate of the difference between the actual value of the going business with the burden of hauling the brick on it, and its value freed from that expense. The difficulty of making the true estimate does not affect the right to recover. As said in the strong opinion in *Blagen v. Thompson* (Or.) 31 Pac.

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647, 18 L. R. A. 315: "The rule that damages which are uncertain or contingent cannot be recovered does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract, but an uncertainty or contingency as to whether such gain or benefit would be derived at all. It only applies to such damages as are not the certain result of the breach, and not to such as are the certain result, but uncertain in amount." See, also, 8 A. & E. Ency. Law, 614; *Petrie v. R. R. Co.*, 29 S. C. 303, 7 S. E. 515. The same principles apply where, as in this case, the business has not been continued, but abandoned, though the method of estimating the damage is necessarily different. When the business has been discontinued on account of the breach, there being no business in existence, the recovery cannot be based on the additional expense of carrying it on, or the decrease of its value growing out of the breach. There is no damage to the business, for there is no business, but obviously it does not follow that there is no loss to its owner for which the defaulting party is liable. When an enterprise is undertaken by one party on the faith of a contract with another, who defaults, and in consequence the enterprise is abandoned, the first question to be decided in ascertaining the measure of damages is whether the circumstances justified the conclusion that there had been a final and complete breach, vital to the enterprise, and warranting its abandonment. If so, the measure of damages should not be less than the actual expense and loss incurred on the faith of the contract. If, on the other hand, the evidence should indicate only a postponement of performance, or other partial breach not vital to the enterprise, and hence not warranting its abandonment, the recovery should be limited to the additional expense or loss, if any, consequent on the default, incurred in the prosecution of the enterprise so far as it had gone. The default not being so serious as to warrant the abandonment of the enterprise, expenses incurred in launching it could not be recovered, but only compensation for the loss of the advantage to the going business contemplated by the contract, as far as it had been prosecuted. The defendant therefore had the right to have the jury instructed to the effect that if the circumstances appearing from the evidence did not warrant the plaintiff in regarding the contract as finally breached, and the success of the enterprise thereby vitally affected, but, on the contrary, the evidence only indicated delay in performance, which only temporarily postponed the benefits to come from the contract, and a default not vital to the enterprise, then he could not recover more than the additional expense which resulted from the breach, which was \$50—the cost of hauling the bricks actually manufactured to the railroad station. The defendant's request being for an unqualified direction to the jury to find a verdict for \$16 only, it could not be granted,

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because the amount could not have been less than \$50, and because, in granting it, the circuit judge would have adjudged an issue of fact upon which there was evidence for the jury to consider. In granting the request, he would have taken from the jury the question whether the plaintiff was justified in regarding the contract as finally and conclusively breached, to the vital injury of the enterprise which he had undertaken in reliance upon it. It follows that the request was properly refused.

It is next insisted that a new trial should be granted because the verdict of the jury was in disregard of the following instruction: "If there was a breach by the railroad in not putting in a side track for Mr. Martin's use in shipping brick only, and if Mr. Martin, with reasonable expense and exertion, could have had the brick hauled to another point for shipment, then it was Mr. Martin's duty to do this; and the most he can recover is the additional cost of hauling to the most convenient station the brick that he actually made and sold, provided he did so haul them, unless there were other special damages foreseen and contemplated by the railroad at the time of making the contract, and not to be avoided by Mr. Martin through reasonable effort and expense." It is manifest that, if the jury reached the conclusion from the evidence that Martin was justified in abandoning his enterprise on account of defendant's default, then this instruction warranted a verdict for the expenses incurred by him on the faith of the contract. *Nettles v. R. R. Co.*, 7 Rich. Law, 190, 62 Am. Dec. 409; 8 A. & E. Ency. Law, 673; 13 Cyc. 63. In this view, it also follows that the circuit judge committed no error of law in refusing the motion for a new trial on the ground that the verdict might properly include, as actual expenses and losses, the cost of removing the plant from Arthur's Lake, the rental value of the mill for the period occupied in removing it from Arthur's Lake and re-establishing it at the railroad, and the cost of transporting the brick burned at the new location to the nearest railroad station. If the jury reached the conclusion that the default of the defendant was such as to warrant the plaintiff in abandoning the enterprise, then the defendant was responsible for the loss of rental value which the defendant knew would necessarily be incurred in moving the mill on the faith of defendant's promise. *Lipscomb v. R. R. Co.*, 65 S. C. 148, 43 S. E. 388; *Tappan v. Harwood*, 2 Speers, 551; *Griffin v. Colver* (N. Y.) 69 Am. Dec. 724.

The judgment of this court is that the judgment of the circuit court be affirmed.

ATLANTIC COAST LINE R. CO. *v.* POSTAL TELEGRAPH CABLE CO.

(Supreme Court of Georgia, June 9, 1904.)

[48 S. E. Rep. 15.]

Condemnation of Railroad Right of Way for Telegraph Line—Award—Appeal.

The telegraph company instituted proceedings against the railroad company in the county where the main office of the latter was located. The award was filed in the office of the clerk of the superior court of the county where the proceedings were had, and an appeal taken to the superior court of this county. This appeal was authorized by the law providing for condemnation of a railroad's right of way for telegraph purposes. Civ. Code 1895, §§ 4677, 4678; Acts 1898, p. 5.

Same—Same—Same.

On the appeal from the award of the assessors in the condemnation proceeding, the issue of fact for the jury is the amount of compensation to be paid for the property taken or damaged for public purposes.

Same—Easement Acquired.

A telegraph company acquires only an easement to the right of way of a railroad company condemned for the purpose of constructing and operating a telegraph line thereon.

Same—Same.

The easement acquired embraces the land actually occupied by the poles and fixtures for guy wires, and the right to stretch the wires upon the poles, and to enter upon the right of way to construct and repair the telegraph line.

Same—Exclusive Right of Occupancy.

The only exclusive right of occupancy the telegraph company acquires by condemnation proceedings is the occupancy of the land occupied by the poles for telegraph purposes.

Same—Measure of Damages.*

The measure of damages in such cases is the value of the land actually taken, and the extent to which the use of the right of way by the railroad company is diminished by its use by the telegraph company.

Same—Damages.

The right of way of a railroad company has no general market value for other uses than that to which it is applied. The appropriation to public use amounts to a withdrawal of the right of way from any use except that which is necessary or auxiliary to the operation of the railroad.

Same—Same.

Peculiar advantages and benefits accruing to a telegraph company from its use of the railroad's right of way cannot be considered in the assessment of damages. The railroad company can only claim compensation for its land taken, and damages resulting from the construction and maintenance of the telegraph line. A burden not imposed by the telegraph company is not an element of damages. Thus there was no error in excluding evidence as to the cost of the change of grade, or the clearing of the right of way and keeping it free from obstructions.

Same—Remote or Speculative Damages.

Remote or speculative damages cannot be recovered. The bare suggestion that at some vague time in the future the railroad company

*See foot-note appended to *Cleveland, etc., Ry. Co. v. Ohio Postal T. C. Co.* (Ohio), 12 R. R. R. 251, 35 Am. & Eng. R. Cas., N. S., 251, where all the preceding authorities in this series are collected.

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may lay additional tracks or build structures for railroad purposes is too remote to authorize the admission of evidence of the damage which might result from such possible contingencies. In its notice of condemnation, the telegraph company stipulated that, should such contingencies happen, it would remove at its own expense the poles and wires, so as not to interfere with such extensions and improvements.

Same—Same.

The possibility of poles placed at a greater distance than their height from the track falling upon the track is too remote to be considered in estimating damages.

Same—Same.

Annoyances and inconveniences to the railroad company must be real, and of such a character as to interfere in some manner with the railroad's right to exercise its business, to become an element of damage.

Same—Same.

The benefit a railroad company may derive from a contract with another telegraph company already occupying its right of way is not an element of damage. The measure of damage includes, not what another telegraph company may contract for certain privileges, but the extent such contract would be impaired by the construction of the second line of telegraph.

Verdict.

The form of the verdict, while irregular, covered all of the issues involved, and the amount found by the jury is sustained by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; P. E. Seabrook, Judge.

Condemnation proceedings by the Postal Telegraph Cable Company against the Savannah, Florida & Western Railway Company. The Atlantic Coast Line Railroad Company was made a party in lieu of the Savannah, Florida & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. L. Clay, for plaintiff in error.

J. R. McIntosh and Garrard & Meldrim, for defendant in error.

EVANS, J. On September 8, 1900, the Postal Telegraph Cable Company caused to be served upon the Savannah, Florida & Western Railway Company a notice that condemnation proceedings would be instituted against it in order to secure the privilege of constructing a telegraph line along its right of way from Albany to Thomasville and from Thomasville to Valdosta. This notice was on the same day filed in the office of the clerk of the superior court of Chatham county. On September 20, 1900, the railway company filed a petition for injunction against the Postal Telegraph Cable Company, alleging that there was no authority of law for the proposed condemnation proceedings, and that the statutes under which the latter company claimed the right to condemn were, for various reasons stated, unconstitutional and void. On the same day the railway company sent a response to the notice above referred to, therein advising the Postal Telegraph

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Cable Company that, in naming the person to act as the arbitrator selected by the railway company, it did so subject to its petition for injunction, and without any prejudice whatsoever to its rights in the premises. Subsequently the railway company filed an amendment to its petition for injunction, and an interlocutory hearing was had thereon upon the 22d of November, 1900; the judge setting aside the restraining order previously granted, and refusing to grant a temporary injunction. To this action of the judge the railway company excepted, and brought the case to this court for review, and on February 28, 1901, the judgment of the lower court denying the injunction was affirmed. See 112 Ga. 941, 38 S. E. 353.

Shortly after the interlocutory hearing on the petition for injunction, and before the decision of this court was rendered, to wit, on December 31, 1900, the railway company appeared before the board of assessors who had been selected to conduct the condemnation proceedings, and, without waiving any of its rights under its petition for injunction, filed objections in writing to the further progress of those proceedings. One of these objections was that the notice of condemnation was legally insufficient, in that it did not point out with reasonable certainty and definiteness the location of the lands sought to be condemned. The Postal Telegraph Cable Company thereafter amended this notice over the objection of the railway company. Despite its protests, the board of assessors proceeded with the investigation, and on January 5, 1901, rendered an award for the sum of \$6,000 as compensation for the property rights of the railway company which the Postal Telegraph Cable Company sought to condemn. On January 16, 1901, the Postal Telegraph Cable Company, being dissatisfied with the amount of this award, entered an appeal to the superior court of Chatham county. On the 13th of March following, the railway company filed in that court a "motion to dismiss and quash said condemnation proceedings," and to declare null and void the award therein rendered. The grounds of this motion were (1) that the condemnation proceedings were without authority of law, in that the statutes upon which they were predicated were unconstitutional and void; (2) that the act of December 20, 1898 (Acts 1898, p. 54), amending certain sections of the Code, "makes no provision whatsoever for the appointment of an assessor in the event the landowner or the railway company, or other person interested, shall fail to appoint an assessor, or if the owner of the land sought to be condemned shall fail to agree upon an assessor, or if the owner is unknown," and that the statutes of this state which relate to the selection of an assessor to act in behalf of the landowner or other person interested "are inapplicable in this case, where one condemnation proceeding is instituted to condemn land located in five (5) separate and distinct counties,"

wherefore said act of 1898 is class legislation, and in conflict with the Constitution of the United States, which provides that no person shall be denied the equal protection of the laws or deprived of property without due process of law, etc., as well as violative of the Constitution of the state of Georgia, for like reasons; (3) that the act of 1898 is further in conflict with the Constitutions of this state and of the United States, because it "fails to make any provision for the appointment of a third assessor in the event the two assessors selected shall fail to agree upon a third," does not provide any machinery for determining the necessity of condemning land or property rights therein for the use of the public, makes no provision for the filing of an award, or for entering an appeal therefrom, and is too vague and indefinite to authorize the condemnation of a railway right of way for use by a telegraph company; (4) that the act of 1898 is "contrary to the Constitution of the state of Georgia, which provides that all cases respecting the title for land shall be tried in the county in which the land is situated," for the reason that said act provides "for the institution and trial of condemnation proceedings in counties other than that in which the land is situated," and authorizes the assessors to render an award without going on the land sought to be condemned and conducting the hearing on the premises, as in other cases provided; (5) that the notice of condemnation did not describe the land sought to be condemned with sufficient certainty, and for that reason the notice was too indefinite to support a certain and valid award; (6) that it did not appear that there was any public necessity to condemn any portion of the railway right of way, nor that the portion sought to be condemned was necessary for the purpose of constructing and operating a telegraph line; and (7) that the "notice of condemnation and the said award provided for the crossing of this railway company's right of way and tracks underground by said telegraph company's line, which is not authorized by law."

This motion to dismiss was on June 8, 1901, amended by adding the following grounds: (1) The award is defective and insufficient because it fails to adjudicate the issues raised by the defendant's objections to the condemnation proceedings, which objections were urged before the assessors before any evidence was introduced; (2) the award is too indefinite, in that it fails "to specify what is so much of the right of way of a railway company as may be necessary for the use of a telegraph company for the purpose of erecting, maintaining, and operating its line of telegraph along and upon such right of way"; and (3) the award fails "to designate and specify the exact portion of the right of way, or how much thereof or what part thereof, may be taken by the plaintiff," and also fails to specify or designate "at what distance from the outer edge of the land on which this defendant operates

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its trains, commonly called its 'right of way,' * * * or at what distance from its track the said poles and line of telegraph might be located and erected"—for which reasons the plaintiff was not authorized, under said award, to enter upon the right of way or make any use of the same, and so to do "would be contrary to the state and federal Constitutions, in that the property of the defendant would be taken without due process of law."

To the motion as amended the Postal Telegraph Cable Company filed its answer, admitting all the allegations of fact on which the motion was based; and on June 8, 1901, the day on which the amendment was made and the answer filed, the court passed on the motion to dismiss, and overruled the same. Later, on July 24, 1901, the railway company filed a motion to dismiss the appeal to the superior court entered by the Postal Telegraph Cable Company, because that court was without jurisdiction to entertain the appeal, and because, if any right to appeal existed under the law, the appeal should have been "filed and tried in the superior courts of the counties of Dougherty, Mitchell, Thomas, Brooks, and Lowndes, and in each of them." On the same day the judge heard this motion, and passed an order overruling the same. He also struck a plea to the jurisdiction, based on the same grounds, which had been filed by the railway company, and overruled a motion to dismiss the appeal presented by that company, predicated upon the company's contention that there was no provision of law authorizing such an appeal to be entered. Thereupon the railway company demurred to the notice of condemnation, insisting (1) that it did not locate with sufficient certainty the land sought to be condemned; and (2) that the law did not contemplate or provide for any removal and replacement of the telegraph fixtures, such as stipulated in said notice, in the event the railway company might in the future desire to construct additional tracks, warehouses, or other structures on its right of way, and a change in the location of the telegraph poles or wires should therefore become expedient. The court overruled this demurrer, the railway company was allowed to amend the answer which it had previously filed and urged before the board of assessors, and the case proceeded to a trial on the merits before a jury. The railway company then invoked a ruling as to the issues to be submitted to and passed on by the jury, and the court held that "the issue to be tried by the jury [was] as to the value of the property taken or damage done to the right of way of the defendant in the construction and maintenance of a telegraph line as set out in the notice of condemnation." On July 26, 1901, the jury returned a verdict reciting that they found (1) that "for taking the property sought to be condemned * * * the Postal Telegraph Cable Company shall pay to the Savannah, Florida & Western Railway Company, as owner, the sum of thirty-three 12-100 dollars"; and (2)

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that no consequential damages or benefits would result from such taking, so far as the property of the railway company not taken was concerned. A judgment was entered in accordance with this verdict, and on July 29, 1901, the railway company filed a motion for a new trial. This motion was subsequently amended by adding thereto 53 grounds, in which error was assigned upon rulings made by the court during the progress of the trial. On February 6, 1903, an order was taken making the Atlantic Coast Line Railroad Company a party to the case, in lieu of the Savannah, Florida & Western Railway Company; it being made to appear to the court that the latter corporation had been consolidated with and merged into the former. The motion for a new trial, as amended, came on for a hearing on February 14, 1902, and was overruled by the Court. The Atlantic Coast Line Railroad Company then sued out a bill of exceptions; therein assigning error upon the refusal to grant it a new trial, as well as upon the overruling of the motion to dismiss the proceeding, and the various other adverse rulings above mentioned, to which the railway company had duly filed exceptions pendente lite.

It is pertinent to add, as a part of the history of this litigation, that this is the fourth time it has been before this court, and that many of the questions now presented for determination have heretofore been adjudicated in favor of the Postal Telegraph Cable Company. The petition for injunction filed by the railway company still remains pending in the court below, there having been as yet no final trial on the merits before a jury. After the judgment refusing to grant a temporary injunction was affirmed by this court (112 Ga. 941, 38 S. E. 353), the railway company filed an amendment to its petition, setting forth various reasons why the condemnation proceedings should be enjoined, and the judge granted a rule calling upon the Postal Telegraph Cable Company to show cause why an injunction should not be granted. After hearing the parties, the judge declined to grant the application for a temporary injunction, the railway company excepted by writ of error, and this court affirmed the judgment of the court below. See 113 Ga. 916, 39 S. E. 399. After the award of the assessors had been made, and pending the appeal to the superior court entered by the Postal Telegraph Cable Company, that company paid into the registry of the superior court of Chatham county the amount of the award, and then proceeded to construct a telegraph line over the right of way of the railway company, which resisted this work of construction with force; cutting down the telegraph poles and removing the same from its right of way. Thereupon the Postal Telegraph Cable Company instituted an independent proceeding, the purpose of which was to enjoin the railway company from interfering with the construction of this telegraph line. The court granted an

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interlocutory injunction, the railway company brought this action under the review of this court by a writ of error, and the judgment of the lower court was affirmed. See 115 Ga. 554, 42 S. E. 1.

1. On the call of the case on appeal, counsel for the railway company requested the court to determine the issue to be submitted to the jury, and the judge submitted the following: "Upon the appeal the issue is as to the value of the property taken, or damage done to the right of the defendant in the construction and maintenance of a telegraph line, as set out in the notice of condemnation." The plaintiff in error contended that many other issues were involved, such as the necessity of condemnation, the jurisdiction of the court to entertain the appeal, and questions of like character. These were purely legal propositions, and had been previously adjudicated by the court, and the rulings on the same affirmed by this court. 112 Ga. 941, 38 S. E. 353; 113 Ga. 916, 39 S. E. 399; 115 Ga. 554, 42 S. E. 1.

The plea to the jurisdiction of the court was stricken on demurrer. Plaintiff in error contends there is no authority of law for an appeal from the award of the assessors to a jury in the superior court of Chatham county; that, if an appeal would lie, the superior court of each of the counties of Dougherty, Mitchell, Thomas, Brooks, and Lowndes had jurisdiction to try the appeal as to the land in each of the respective counties, in which courts said appeals should be filed, and in none other. Acts 1894, p. 98 (Civ. Code 1895, §§ 4677, 4678), provided for the filing of the award in the office of the clerk of the superior court of the county where the property is situated, or the franchise sought to be condemned is exercised, and giving either party the right to enter an appeal from the award to the superior court of the county where the award is filed. The amendatory act of 1898 (Acts 1898, p. 54), the constitutionality of which was upheld in the carefully considered opinion of Justice Little in the case in 115 Ga. 554, 42 S. E. 1, provides for one condemnation proceeding, which may be had in the county in which the principal office of the company is located. The main office of the plaintiff in error was in Chatham county, the condemnation proceedings were had in that county, and the award was filed in the office of the clerk of the superior court of that county.

In the construction of an amending statute, the law amended, as well as the amending act, should be construed in such a manner as to give full effect to the legislative intent. The purpose of the Legislature by the amending act was to avoid a number of condemnation proceedings by providing for one trial, instead of as many trials as there are counties traversed by the telegraph company. The right of appeal was not affected in any manner. The old law provided for the filing of the appeal in the office of the clerk of the su-

perior court where the property is situated, because the condemnation proceedings were had in that county. If the condemnation proceedings are had in the county of the principal office of the corporation whose property is sought to be condemned, the award of the assessors should be filed in that county, and the superior court of the county where the award is filed would be the proper forum to which the appeal should be taken.

A telegraph company does not acquire the fee, but only an easement in the right of way of a railway company condemned for the purpose of constructing a telegraph line thereon. The easement embraces the land actually occupied by the poles and fixtures for guy wires, and the right to stretch the wires on the poles, and to enter upon the right of way to construct and repair the telegraph line.

The measure of damages in such a case is the value of the land actually taken, and the extent to which the value of the use of the right of way by the railway company is diminished by its use by the telegraph company. The telegraph company must pay for the land taken and the damage sustained by the railway company by the construction and maintenance of the telegraph line. The damage thus sustained is not the value of the land under the wires and between the poles, but the extent to which the value of the use of that part of the right of way between the poles and under the wires for railroad purposes is diminished by its use by the telegraph company. The space between the poles is not occupied exclusively by the telegraph company. The railway company still has the right, notwithstanding the construction of the telegraph line, to use this interval of space. It cannot be said that the land between the poles is taken, where the railway company has not been excluded from its possession, but has a right to use this particular part of its property for any lawful use, just as it had before the construction of the telegraph line, with the limitation of the burden imposed thereon for the necessary purposes of the telegraph company as designated in its notice of condemnation.

In arriving at the value of the land actually appropriated, the general salable value of the right of way for other uses than that to which it is applied by the railway company cannot be considered. While it is true that the railway company has the absolute fee, the right of way has no general market value so long as it is used by the railway company for railroad purposes. The appropriation to public use amounts to a withdrawal of the right of way from any use except that which is necessary or ancillary to the operation of the railroad.

The railway company is a creature of the law. It is an artificial person, with limited powers, and the scope of its powers is determined by its charter. The act of incorporation, while conferring powers, also imposes duties, upon this

legal entity. It owes a duty to the state and the public to exercise its corporate functions for the promotion of the purpose of its organization. So long as a railway company uses its right of way for the purpose of its incorporation, it cannot devote it to any other purpose than that of operating a railroad, or some purpose ancillary thereto. Any other disposition of its right of way while it is discharging its duty to the public under the act of incorporation cannot be presumed. The record does not disclose any intention, present or prospective, on the part of the railway company to abandon its right of way, or to devote it to any other purpose than its use for a railroad. The railway company, in the operation of a railroad, is performing a quasi public function. On the faith of the discharge of this public duty, it was given the right to acquire, either by voluntary contract or by condemnation, private property necessary to accomplish the purpose of its organization. The possible contingency of applying the land acquired for this purpose to a different and altogether foreign use, even permissible under its charter and the tenure of its title, is too remote to be considered in assessing the value of the land. In estimating the value of the land taken and appropriated to the exclusive use of the telegraph company, only the value of the land, determined by the use to which it is applied, can be considered; and any supposed market value contingent on the remote possibility of the abandonment of the operation of the railroad, or the subjection of the right of way to any other use, is too remote to be taken into consideration.

That the right of way may possess peculiar advantages and benefits to the telegraph company in the construction and maintenance of its line is not a proper element in the estimate of damages. The telegraph company is under a legal duty to compensate the railway company for the damage done to it by the construction of its line of telegraph, and any supposed benefits which it may receive from using the right of way are of no concern to the railway company, if the latter receives full and adequate compensation for the value of the land taken, and the damage done to its property by the construction of the telegraph line. A burden not imposed by the telegraph line is not an element of damage. Likewise the cost of clearing the right of way, draining the same, and keeping it free from obstructions, which was expense incurred by the railway company for the purpose of operating its railroad, is not to be considered in assessing the damages, because this expense is incurred, not as a result of the construction of the line of telegraph, but because it was necessary to the railway company, in the safe conduct of its own business, to do this very work. The right of way is cleared, the natural growth is removed, not to provide a suitable situs for the construction of a telegraph line, but to facilitate and aid the railway company in the operation of

its trains. This condition of things existed at the time the telegraph company sought to build its telegraph line, and only to the extent that the telegraph line interferes with the use of the right of way can the railway company recover damages. In the operation of its railroad, the railway company finds it necessary to burn off the grass and decayed vegetation, and to keep down undergrowth, to protect its tracks from the ravages of fire. Independently of the location of the telegraph line on its right of way, the railway company must continue to perform work of this character for the protection of its own property. What has been done for its own benefit cannot be claimed as an element of damages by reason of the occupancy of its right of way by the telegraph company's line.

It is a general and fundamental principle of the law that damages, whether resulting from the breach of a contract or the commission of a tort, remote and speculative in their nature, cannot be recovered. The bare suggestion that at some vague time in the future the railway company may lay additional tracks or build structures for railroad purposes is too remote to authorize a recovery of damages resulting from such possible contingencies. Besides, in the present case the telegraph company expressly stipulates in its notice of condemnation that it seeks to occupy the railroad property with its line of telegraph, subject to the right on the part of the railway company to change its location point on the right of way to such other place as will not interfere with the railway company, in the event the railway company should find it necessary to lay additional tracks or build structures on its right of way.

Any inconvenience or annoyance resulting from the construction of the telegraph line which is of such a character as to interfere in any way with the operation of the railroad by reason of the construction of the telegraph line may properly be considered by the jury in assessing damages, but the evidence must disclose the facts from which such inconveniences or annoyances result. No presumption of fact can be drawn that any special annoyance or inconvenience will result solely because of the construction of the telegraph line.

Plaintiff in error says that another element of damages which was excluded from the consideration of the jury was the rental value of the right of way, and the benefit it derived from its contract with the Western Union Telegraph Company. From what has been said, the right of way has no general salable value. It follows that it can have no general rental value. It cannot be presumed that its present contract with the Western Union Telegraph Company will continue indefinitely. The benefit to the railway company from its contract with the Western Union Telegraph Company cannot be considered in the estimate of damages, because the measure of damages includes, not what another telegraph

company may contract to pay for certain privileges, but the extent that contract would be impaired by the construction of the second line of telegraph. Instead of being damaged, it would seem that the railroad company, having the advantage of two lines—one on either side of its right of way—would be benefited, because of probable competition. Another view which might properly be taken of this contract with the Western Union Telegraph Company, in considering whether the contractual benefit derived therefrom would be an element in measuring damages, is that it would be in the power of the railway company and the first telegraph company to make a contract by which the telegraph company would assume to pay such an unreasonable sum in excess of the real value of the benefits obtained as to exclude another telegraph company from occupying its right of way. A contract of this kind would have a tendency to create a monopoly, and, as was held in the case of Western Union Telegraph Company v. American Union Telegraph Company, 65 Ga. 160, 38 Am. Rep. 781, a contract between a railroad company and a telegraph company granting exclusive right of occupancy on the railroad right of way is void.

The railway company insists that the erection of the poles is a menace to the safe operation of its road. We are unable to see how a telegraph pole of less height than the distance from its location to the track can be considered a menace to the operation of the road. It is possible that as a result of a violent storm the poles may be blown down and across the track, but the possibility of such result is so contingent that it is not a proper element in the assessment of damages. The fact that on a past occasion a tree located near the edge of the right of way was blown across the track by a storm affords no reason to conclude that a telegraph pole or poles may be blown across the track. The instance cited arose out of the ordinary. It was not normal, and possibly may never occur again. Should an injury of this character result in damage to the railway company, by reason of the defective or faulty construction of the telegraph line, it has an ample remedy for reimbursement, but it will not be presumed that such an injury may result in the ordinary course of affairs.

There is an essential difference between the various elements of damage which enter into the assessment of private property taken for public use, and that which enters into the assessment of damages for burdening property devoted to one public use by imposing upon it an additional easement of a public nature. Where private property is taken for public use, as by a condemnation by a railroad company, the owner is entitled to compensation for its whole value—not for any particular object, but for all purposes to which it may be appropriated. Thus in the Bridge Case (Harrison v. Young, 9 Ga. 359) the owner of the land was permitted to prove the value of the land seized and occupied by the com-

pany as a bridge site, and its value for any and all other legitimate purposes to which it was specially adapted. This same principle was applied in the case of Boom Company v. Patterson, 98 U. S. 403, 25 L. Ed. 206, and it was there held that the owner was entitled to compensation for what the land was worth from its availability for valuable uses. In both of these cases the taking of the private property was of such an exclusive character that the owner was entirely deprived of any further use and enjoyment of it. His dominion over it ceased, and the public use was inconsistent with any use of the property by the original owner. This is not the case where an easement is imposed on property already appropriated to public use, which easement does not absolutely exclude, but only curtails, the use of the property burdened with the servitude. To the extent the easement impairs the use of the servient land, the owner of the latter is damaged.

The current of authority as to the measure of damages where a telegraph company condemns a railroad right of way is in accordance with the foregoing views. *Chicago, Burlington & Quincy R. R. Co. v. City of Chicago*, 149 Ill. 457, 37 N. E. 78; *Chicago & Northwestern Ry. Co. v. Town of Cicero*, 157 Ill. 48, 41 N. E. 640; *St. Louis & Cairo R. R. Co. v. Postal Telegraph Co.*, 173 Ill. 508, 51 N. E. 382; *Mobile & Ohio R. R. Co. v. Postal Telegraph Cable Co.*, 120 Ala. 21, 24 South. 408; *Southwestern Telegraph & Telephone Co. v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 52 S. W. 106; *Texas & N. O. R. Co. v. Postal Tel. Cable Co.* (Tex. Civ. App.) 52 S. W. 108; *Postal Tel. Co. of Utah v. Oregon S. L. R. Co.* (Utah) 65 Pac. 735; *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; *Mobile & Ohio R. R. Co. v. Postal Telegraph Cable Co.*, 76 Miss. 731, 26 South. 370, 45 L. R. A. 223; *Railroad v. Telegraph Co.*, 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403; 3 *Joyce on Damages*, § 2204; *Cleveland, Cinn., Chicago & St. L. Ry. Co. v. Ohio Postal Tel. Cable Co.*, 68 Ohio St. 306, 67 N. E. 890, 62 L. R. A. 941.

Plaintiff in error claims that the trial judge committed error in excluding and admitting evidence, and in charging and refusing to charge certain legal principles to the jury. It is not necessary to discuss each assignment of error. The application of the principles herein announced may be easily made to each specific assignment. The trial judge charged the jury on the measure of damages as follows:

"The railroad company is entitled to recover the reasonable value of the land taken for railroad purposes—the reasonable value to the railroad for railroad purposes as a right of way. It is entitled, farther, to recover such consequential damages as are appreciably proven, and which you can determine from the evidence, flowing from the taking of that right of way to the railroad company. That is a matter for

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you to determine from the evidence. I charge you, gentlemen, you are not to consider remote, contingent, and imaginary things that may never possibly happen, or that may possibly happen in the remote future."

"Unless it appears from the evidence that within the present or near future there is an intention on the part of the railroad company to abandon a portion or the whole of the right of way, either in the country or the city, and sell it as private property, that an estimate based upon the possible contingency that at some time in the future the railroad company may want to dispose of its right of way for private sale, or for other purposes than for purposes of a right of way, is too remote and contingent to be taken into consideration in your estimate of damages in this case."

"The railroad company is entitled to recover the reasonable value to the railroad company for railroad purposes of the right of way for amount of land taken and the damages that have been proven * * * for the taking of the easement by the telegraph company over the right of way—the damage to the railroad company in the use of its right of way for railroad purposes."

"Has the use to the railroad of the right of way projected by this telegraph and cable company diminished to the railroad company the value of its use of the right of way for railroad purposes? If there has been no damage, or if the damage is nominal, then you would give merely nominal damages."

"If you estimate from the evidence—appreciably shown by the evidence—consequential damages resulting to the railroad company in the use of its right of way for railroad purposes by the taking of this easement, * * * then add that amount to your estimate of the value of the land actually taken, to the railroad for railroad purposes."

"The amount of land taken in this case is the amount of land occupied by the poles of the telegraph and cable company, and by the fixtures for guy ropes."

The foregoing excerpts from the trial judge's charge to the jury fairly stated the measure of damages recoverable by the railroad company; the various rulings on the admission and exclusion of evidence were in harmony therewith; and, even if any minor errors may have been committed, which is not conceded, they were not of such a character as to work a reversal of the verdict.

Plaintiff in error contends that the verdict is only for nominal damages, and for a much smaller sum than the evidence demanded. Witnesses testified as to the actual value of the land taken, allowing one square foot to the pole, and the verdict can be supported on this evidence; giving nominal damage for decrease in value of the use of the right of way for railroad purposes. In one of the Illinois cases cited (*St. Louis & Cairo R. R. Co. v. Postal Telegraph Co.*, 73 Ill.

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508, 51 N. E. 382), the jury returned a verdict for \$99 for the damages sustained in erecting a telegraph line through five counties. The damage for opening a street over the railroad right of way in the populous city of Chicago was assessed at \$1. The Supreme Court of the United States, in the case of Chicago, Burlington & Quincy R. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, held that the measure of compensation was the amount of decrease in the value of the use for railroad purposes by the use for the purpose of a street, being exercised jointly with the use of the company for railroad purposes, and the compensation would be nominal if the railroad's use of its tracks were not unduly interfered with for railroad purposes by the crossing of the street.

13. The form of the verdict rendered was that prescribed by the statute for the award of the assessors. If the verdict is good in substance, its effect will not be vitiated because of any irregularity in form. The verdict, construed with the pleadings, covered the issues submitted by the judge, and is sufficiently definite.

The verdict is supported by the evidence, and, no reversible error of law having been committed, the judgment denying a new trial is affirmed. Judgment affirmed. All the Justices concurring.

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IRONWORKS CO. v. SAME. HENDERSON & BRO. v. SAME.

(Court of Errors and Appeals of New Jersey, Sept. 30, 1904.)

[58 Atl. Rep. 935.]

Mechanic's Lien—Effect of Conveyance to Railroad Company.

The right to lien a building for materials furnished under our mechanic's lien act is not rendered unenforceable by the conveyance of the property to a corporation for railroad purposes.

Same—Application of Statute—Manufacturing Purpose—Electric Power for Trolley System.

The production and control of electric power by mechanical means and its adaptation for use upon a trolley system is a "manufacturing purpose," within the meaning of section 8 of the mechanic's lien law (P. L. 1898, p. 538).

Same—Same.

In the absence of conflicting claims between the person who actually performed the labor and the person who, under a contract, caused it to be performed upon a building, the latter is, by our mechanic's lien law (P. L. 1898, p. 538), given a lien for the labor so furnished.

Same—Estoppel.

When a subcontractor knows that a building contract under which he is proposing to accept employment provides that no subcontractor shall file any lien, the mere acceptance of such employment will bar him from asserting a lien in opposition to such provision.

(Syllabus by the Court.)

Error to Circuit Court, Mercer County.

Actions by the Bates Machine Company, the Phoenix

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Ironworks Company, and Henderson & Bro. against the Trenton & New Brunswick Railroad Company. Judgments for plaintiffs, and defendant brings error. Judgments in favor of the Phoenix Ironworks Company and Henderson & Bro. affirmed, and the judgment for the Bates Machine Company reversed.

William M. Lanning, for plaintiff in error.

Norman Grey, for defendants in error.

GARRISON, J. The three writs of error that have been argued together bring up records of judgments recovered in actions brought to enforce mechanics' liens.

In the case of the Bates Machine Company, the claimant was a subcontractor with the defendant Henry M. Sciple, the principal contract being between Sciple and a corporation called the Railroad Construction Company. This contract was dated April 5, 1902, and was not filed. The defendant owner, the Trenton & New Brunswick Railroad Company, is the grantee of the Railroad Construction Company under a conveyance dated July 28, 1902. Work under the contract and the furnishing of material by the plaintiff began prior to July 1, 1902.

These dates effectually dispose of the first contention of the plaintiff in error, namely, that "no lien is given by our mechanic's lien act either for labor performed or materials furnished for any building for a railroad company which is essential to the operation of that company's railroad." The argument made in support of this contention has been examined sufficiently to see that, irrespective of its soundness or unsoundness as an abstract proposition, it is not applicable to a case where the corporation in whose behalf it is invoked has become the owner of the property after the right to lien it for the performance of an entire contract had commenced to run, which is the situation here. The proposition that would be pertinent to the facts of the present case, namely, that a subsisting right of lien is rendered unenforceable by the conveyance of the property to a corporation for railroad purposes, has, for obvious reasons, not been advanced. *Edwards v. Derrickson*, 28 N. J. Law, 39, affirmed *Derrickson v. Edwards*, 29 N. J. Law, 468, 80 Am. Dec. 220.

The second assignment of error is that the machinery furnished by the claimant was not "for manufacturing purposes," and hence was not a building, under section 8 of the mechanic's lien act (P. L. 1898, p. 538). The machinery furnished by the claimant and set up in the power house of the plaintiff in error consisted of engines, dynamos, and other connected appliances for the production and control of electric power and its adaptation for use upon a trolley system. The contention of the plaintiff in error is that the entire clause, "fixed machinery or gearing or other fixtures for manufacturing purposes," is qualified by the last three words,

and hence that it covers only machinery that is used for manufacturing purposes, and that the production of electric power is not a "manufacturing purpose" because "the term 'manufacture' means to make something out of raw materials or out of prepared materials," and "electric power is not a material substance." I am inclined to agree in the statutory construction contended for, but I am unable either to give this restricted meaning to the words "for manufacturing purposes" in this context, or to assent to any conclusion that involves the idea that something that is elicited from its natural source by mechanical processes is not a material substance. The question, however, is not one of scientific terminology, but rather of the sense in which an ordinary term was used by the Legislature in framing an enactment whose sole purpose was to secure to laborers and others payment for furnishing and erecting machinery for manufacturing purposes; a descriptive term that should be given its broadest signification in order to effect what was clearly the legislative will. That the word "manufacture" is no longer limited to something that is made by hand is not more obvious than that by the very necessities of the case it must continue to travel farther and farther from its first meaning in keeping with the growth and progress of the thing for which it continues to stand, so that to make by machinery or by chemical reaction or by any other device known to art has already entirely superseded the original notion of hand fabrication. While its original meaning lasted, however, it necessarily involved the idea of tangibility, but with the elimination of the manual element from the essential meaning of the word there was no longer the slightest justification for the retention of this notion of tangibility as a restriction upon its broadening usefulness, and as a fact it has been entirely dropped from current use when applied to such processes as the manufacture of oxygen, or of carbonic acid, or of nitrous oxide, or of illuminating gas, or of a host of other products totally lacking in tangibility. The essential meaning retained by the word "manufacturer," or perhaps that has been acquired by it, is that of effecting by art some change in materials or elements as they exist in a state of nature, by which they are rendered more subject to man's control, or more serviceable to his use. A mere appropriation of natural objects without imparting to them this added quality—as in the case of agriculture, or of the gathering of natural ice—is not manufacture in this current sense; nor is the mere liberation or collection of natural products, such as petroleum or natural gas. But the production of illuminating gas is a manufacture. *Nassau Gaslight Co. v. City of Brooklyn*, 89 N. Y. 409. So is the making of ice by artificial means. *People v. Knickerbocker Ice Co.*, 99 N. Y. 181, 1 N. E. 669.

Neither the fact, therefore, that the material elements to be

acted upon already exist in a state of nature, nor the fact of their intangibility before or after the described change has been impressed upon them, militates against the application of the word "manufacture" to the process by which such change is wrought. In the recent case of *People v. Wemple* (decided in the New York Court of Appeals) 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708, the precise question we are now considering was before the court as a basis for exemption from taxation, to which, for obvious reasons, a much more stringent rule is applied than to remedial legislation such as our mechanic's lien law. In the opinion in that case Judge O'Brien said: "The true inquiry would seem to be whether the corporation would not be considered in common language as engaged in some manufacturing process. Though granting all that is said by experts and others about electricity as a natural element or force, to say that electricity exists in a state of nature, and that the relator collects or gathers it, does not fully or accurately express the process. According to the common understanding, the electricity or thing that produces the results is generated or produced by the application of power to machinery; that is, by a process purely artificial. Passing by the refinements of scientific discussion, it would seem to be common sense to hold that a corporation that does this is, in every just sense of the term, a manufacturing corporation. The materials from which all manufactured things originate exist in a state of nature, but the manufacturer, by application to these materials of labor and skill, gives to them a new and useful property. The electricity which is generated and transmitted by the operation of the relator is a very different thing from that mysterious element which is said to pervade nature."

Another recent case (*Commonwealth v. Northern Electric Light & Power Co.*, 145 Pa. 105, 22 Atl. 839, 14 L. R. A. 107) is cited in certain works of reference as holding the opposite of this view, but, on the contrary, while affirming the judgment of the court below, where such opposite view had been expressed, the reviewing court used this language: "The scientists whose views the learned judge adopted may be right or wrong. We have no need to decide this question. The laws are written ordinarily in the language of the people, and, if this case depended on that question, we should be led to a different conclusion, and hold that the company was a manufacturing company."

In our own state, in the case of *In re Consolidated Electric Storage Co.* (N. J. Ch.) 26 Atl. 983, it was said that the production of electricity was a manufacturing business; and in *Hughes v. Lambertville Electric Light Co.*, 53 N. J. Eq. 435, 32 Atl. 69, it was expressly held that wires and insulation for the transmission of electric power were subject to lien under the provisions of the very section of the mechanic's

lien act that we are now considering. The opinion of Mr. Justice Depue in *Evening Journal Ass'n v. State Board of Assessors*, 47 N. J. Law, 36, 54 Am. Rep. 114, while not directly in point, is valuable for its reference to Dr. Brande's definition of "manufacture." The exact language of the author referred to is: "The province of a manufacturer is to shape or modify materials with a view to the development of those powers and forces which they possess, and which are necessary, useful, or convenient to mankind." Brande & Cox's Dictionary, art. "Manufacture."

It is furthermore of marked significance that in other statutes the Legislature of this state uses the word "manufacture" to mean the production of electric power; as, for instance, "manufacture of electricity for light, heat and power." P. L. 1892, p. 403; P. L. 1894, p. 36. We must conclude, therefore, that the words "manufacturing purposes" have an accepted meaning that is broad enough to cover the production by mechanical means of electric power, and that they should be read in that sense in the statute in question, provided the context is one that fairly indicates that such was a meaning in which the Legislature employed them. Obviously, manufacturing may be regarded by the Legislature in a variety of aspects, and, where its effect upon the community at large is chiefly or solely considered, the nature of the products of manufacture and their distribution would be a paramount consideration, and hence give color to the sense in which the word should be deemed to be employed. Hence there are decisions to be found in which exemption from taxation has been denied to electric light companies upon the ground that they were not included under the term "corporations carrying on manufacturing within the state" (12 Am. & Eng. Enc. of Law, 266); although in the cases cited from New York and Pennsylvania even those considerations have not been considered sufficient to overcome the force of the word itself in the common acceptance. Where, however, no such questions intervene, and the word is employed solely as descriptive of machinery, and used in a remedial statute, there is nothing to prevent, and nothing should prevent, the court from giving to the term "manufacture" the broadest meaning that it has acquired in the language of common people in speaking generally of mechanical enterprises. Especially is this so when such remedial legislation concerns the relation of debtor and creditor with respect to mechanism which, by a combination of labor and capital, produces a result that is to the common mind, in this aspect, indistinguishable from ordinary manufacturing operations. I have no difficulty in reaching the conclusion that the language of the eighth section of the mechanic's lien act (P. L. 1898, p. 538) is broad enough to cover the materials furnished in the present case by the plaintiff to the defendant for the production of electric power.

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Independently of the section of the mechanic's lien law that we have been considering, it is highly probable that the materials which were placed by the plaintiff in the power house of the defendant, as part of the means by which to carry out the purposes for which the building was adapted, were so annexed to it as to become as between the plaintiff and defendant part of the realty, under the cases of *Feder v. Van Winkle*, 53 N. J. Eq. 370, 33 Atl. 399, 51 Am. St. Rep. 628, and *Knickerbocker Trust Co. v. Penn Cordage Co.* (decided June 20, 1904) 58 Atl. 409. The case, however, has not been argued in this aspect, and the testimony essential to its presentation, which appears only incidentally, is not sufficiently full to warrant us in making it the basis of a decision between these parties.

A third assignment of error gives rise to the contention that a subcontractor "can have no lien for any labor furnished by its agents or employees"; the argument being that the only lien given by the mechanic's lien act is "to the person who actually performs the labor, and to no one else," which is not the language or the purport of the statute. In the absence of conflicting claims between the person who actually performs the labor and the person who causes it to be performed, the latter is so clearly within the legislative language as to render any discussion of the matter unnecessary.

A fourth assignment of error is that "the trial court overruled evidence offered by the plaintiff in error to prove that the defendant in error, before entering into its contract with Henry M. Sciple, in the testimony referred to, had notice of the provision in the contract between the Railroad Construction Company and Henry M. Sciple that the said Henry M. Sciple did thereby agree to file no liens for any labor or material furnished under said contract, and that no subcontractor for work or materials should have any right to file any lien for any sum which might be due or become due to such subcontractor, and that any such right to file such lien was expressly waived."

The bill of exceptions upon which this assignment is based is as follows:

"Ques. Do you know—have you any present knowledge—as to whether the contract between the construction company and Sciple was received back from the Bates Machine Company?

"(Objected to.)

"The Court: I will permit that.

"Ans. Yes.

"Ques. What present knowledge have you?

"(Objected to on the ground that it is immaterial.)

"Mr. Lanning: I purpose to show that this contract, before a contract was entered into between the Bates Machine Company and Sciple, was submitted to the Bates Machine

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Company; that they saw it; that they saw the provisions with reference to the waiver of liens; and, having entered into this contract with actual notice of the provision on waiver in the main contract, they would be bound by it.

"The Court: My view is that such testimony would be immaterial. I cannot see how the Bates Machine Company can lose any of its rights by any provision put in the original contract, whether they knew it or not. I exclude the offer."

The contract between the construction company and Sciple contained the provision concerning liens set out in the assignment of error.

It is evident, therefore, that the ruling to which exception was sealed raises the question whether the Bates Company may successfully assert its lien if at the time it entered into its subcontract with Sciple it knew that Sciple's contract with the owner contained a provision that no subcontractor should file a lien for any sum due him under his subcontract—a question that apparently has not been judicially determined in this state. Elsewhere (notably in Pennsylvania) it has been held that the bare existence of such a provision in the building contract bars the liens of subcontractors and materialmen, whether they knew of it or not. 20 Am. & Eng. Enc. of Law, p. 361.

This rule, which proceeds upon the theory that subcontractors are ipso facto chargeable with knowledge of what is contained in the contract under which the building is erected, has not been generally followed, and was expressly disavowed in the opinion delivered in our Supreme Court in the case of Atlantic Lumber Co. v. Atlantic Coast Brewing Co., 59 N. J. Law, 48, 35 Atl. 647, where it was said: "The plaintiff in error was not injured unless the bare existence of the waiver of liens in an unfiled contract protects a building from liens. This obviously is not so. The right of lien given by the first section is fixed when materials are furnished, unless it is taken away by section 2 (P. L. 1898, p. 537). The right is personal, and is vested unless personally waived."

That case, which was affirmed by this court upon the opinion just cited, did not, however, involve the question of notice.

In the reported case of Atlantic Coast Brewing Co. v. Clement, 59 N. J. Law, 48, 35 Atl. 647; Id., 59 N. J. Law, 438, 36 Atl. 883—the Supreme Court and this court decided that a subcontractor who, before the commencement of the building, had, as one of three sureties for the builder, executed to the owner a bond conditioned for the faithful performance of the builder's contract, and that he should keep the building free from the lien of any and all debts, was not thereby deprived of his own right to file a lien for the amount of materials afterwards furnished by him. This decision proceeded upon the idea that the plaintiff was not to be deprived of the

right of contribution from his co-sureties on the bond merely because circuitry of action would be avoided by holding that by indemnifying the owner against all liens the subcontractor had barred his own right to lien. No other question was involved or considered, and, as the decision did not travel outside the provisions of the bond, no question arose as to the provisions of the contract, or of the subcontractor's knowledge respecting them, concerning which there was no testimony offered, no presumption of fact, and no point made.

In other jurisdictions where the question has arisen contrary results have been reached. The cases are collected in 20 Am. & Eng. Enc. of Law, p. 361, and Cent. Dig., vol. 34, col. 2246, et seq.

An examination of these cases justifies the conclusion that the greater weight of authority is that a provision in a building contract against the assertion of liens by any one will prevent a subcontractor or materialman, who has notice of such provision, from asserting a lien for labor or materials furnished pursuant to such contract.

This rule, we think, rests in sound reason. The right to lien is given against the owner by statute, but the debt for which the lien is given must be one that is incurred in fulfilling the owner's contract. Being a personal privilege, the statutory right may be waived in favor of the owner; hence the owner may stipulate that it shall be waived. Of this there is no doubt, the only question being whether, in a given case, such stipulation has been made. Ordinarily, the owner makes but one contract, viz., that with the builder; hence a provision in that contract that there shall be no liens is the owner's proffer or announcement that a waiver of liens is a condition of any debt incurred in fulfilling his contract. But waiver implies a meeting of minds; hence, until knowledge of such provision is imparted to others, the owner's condition is binding upon the builder alone. As soon, however, as knowledge of such provision is imparted to others, it constitutes as to them a known condition, which they are at liberty either to accept or to decline. If with knowledge that such a condition is contained in the contract they accept employment under it, they accept the condition; if they decline to accept the condition, they must decline to accept the employment. Common fairness requires that notice of the condition shall be given if a waiver of liens is to be claimed, and common honesty requires that, when notice of the condition has been given, no lien shall be claimed.

This rule avoids, on the one hand, the extreme of permitting the owner to claim the benefit of a waiver of which in common fairness he should have given notice, and, on the other hand, it avoids the opposite extreme of allowing a lien to be asserted which in common honesty must be deemed to have been waived.

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Upon both reason and authority, therefore, we conclude that when a subcontractor knows that a building contract under which he is proposing to accept employment contains a provision that no lien shall be asserted, the mere acceptance of such employment will bar him from asserting a lien in opposition to such provision.

Applying this rule to the case in hand, in which the defendant was denied the right to show that the plaintiff, before undertaking to engage in the fulfillment of the building contract, had notice that it contained a provision that no subcontractor should file any lien, the necessary conclusion is that such denial was an injurious error that entitles the defendant to a reversal of the judgment entered in the circuit court.

In the case of the Phoenix Ironworks Company against the same defendant the first two points advanced for the reversal of the judgment are the same as those disposed of under the first and second assignments, and will not be further discussed. The additional point is made that the boilers for which this lien is sought to be enforced were furnished more than four months before filing the lien claim and the commencement of suit. This contention rests upon and involves only a question of fact with respect to the date at which the furnishing of the material in question was completed. The court has critically examined the testimony upon this point, and is satisfied that it was correctly dealt with by the court below. No useful purpose would be served by rehearing the matter here. The error for which the Bates Machine Company case was reversed is not available to the defendant in this case. The testimony as to the subcontractor's knowledge of the provision against liens was conflicting; hence there was no error in the refusal to nonsuit upon that ground. This judgment is affirmed.

In the case of William Henderson & Bro. against the same defendant, the first and second points argued have been disposed of under the first and third assignments considered in the Bates case. The additional point urged is that the lien claim for erecting certain engines in the defendant's power house included the expense of hauling such engines from the freight station, and hence was not "labor furnished at the power house." The contract was an entirety, and we think that these incidental items were, under the circumstances disclosed by the proofs, fairly within the undertaking to erect the machinery in question. 20 Am. & Eng. Enc. of Law, p. 341.

The judgments recovered by the Phoenix Ironworks and Henderson & Bro. are affirmed; the judgment recovered by the Bates Machine Company is reversed, in order that there may be a venire de novo.

CHICAGO, B. & Q. R. R. et al. v. RICHARDSON COUNTY et al.

(Supreme Court of Nebraska, Oct. 5, 1904.)

[100 N. W. Rep. 950.]

Railroad Bridges—Taxation—Assessment.

Chicago, B. & Q. R. R. Co. v. Richardson County, 21 Am. & Eng. R. Cas., N. S., 702, 85 N. W. 532, 61 Neb. 519, followed.

Constitutional Law.

Sections 39, 40, art. 1, c. 77, Comp. St. 1901, are constitutional and valid.

(Syllabus by the Court.)

Commissioners' Opinion. Appeal from District Court, Richardson County; Stull, Judge.

Action by the Chicago, Burlington & Quincy Railroad and others against the county of Richardson and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Smyth & Smith and John Gagnon, for appellants.

J. W. Deweese, Francis Martin, Frank E. Bishop, and Chas. F. Manderson, for appellees.

John P. Breen, H. H. Baldrige, C. C. Wright, and W. H. Herdman, amici curiæ.

POUND, C. The facts in this case are the same as those involved in *Chicago, B. & Q. R. R. Co. v. Richardson County*, 61 Neb. 519, 85 N. W. 532, except that assessments for different years are in question. A further point is made on behalf of the county, however, not raised in the former case, namely, that sections 39, 40, art. 1, c. 77, Comp. St. 1901, are unconstitutional. This point has been argued with no little ability and ingenuity on the part of appellants, and is of such importance as to require our careful consideration.

Four objections are made to the plan for assessment of railroad properties prescribed by said sections. The first is that "sections 39 and 40, in legal effect, exempt the franchises of the railroad corporations from taxation, and thereby violate section 1 of article 9 of the Constitution." This contention is disposed of sufficiently, in our opinion, by *State v. Savage* (Neb.) 91 N. W. 716, in which this court held, construing the sections in question, that "the State Board of Equalization, in the assessment of railroad and telegraph properties, should include in its assessment the value of the franchises with the tangible property assessed." Holcomb, J., delivering the opinion of the court, says: "It seems reasonably clear that in assessing railroad and telegraph property as contemplated by sections 39 and 40, the whole property belonging to any one corporation, and subject to assessment in this state, should be valued for tax purposes in its entirety, and that in such valuation should be included all elements going to make up the entire property, whether consisting of franchises or other intangible property, or physical property, be it real, personal, or mixed."

Next, it is asserted, to quote from the brief of counsel, that "the statute, sections 39 and 40 of the revenue law, for the assessment of railroad property, provides a different mode of assessment for that property from that which is provided for the property of the citizen, and is therefore void, as violating the uniformity required by the Constitution." Section 1, art. 9, of the Constitution, reads in part: "The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the Legislature shall direct." Construing this section, the court said in *State v. Savage*, supra: "The paramount object of the Constitution and the laws relative to taxation, as we conceive the rule to be, is to raise all needful revenues by valuation of the taxable property so that each owner of property taxed will contribute his or its just proportion of the public revenues." If properties are so essentially distinct in their nature that to assess each in one particular way would not result in requiring the respective owners to pay taxes in proportion to the value of their respective properties, it is evident that an attempt to provide a uniform method of assessment would involve contravention of the "paramount object" of the Constitution. Hence it is the result, not the method employed in reaching it, which must be considered. Counsel point out that section 52 (Comp. St. 1901, c. 77) directs the assessor, when valuing real property generally, to fix "the value of each tract or lot improved, the value of each lot or tract not improved, and the total value," while the state board of equalization, in valuing a railroad, is directed, as counsel put it, to "lump the whole thing, whether it be buildings, lots, tracts of land, or personal property, and put a price upon the heap." But the two species of property are in no wise comparable. What sort of result should we get if a local assessor, assessing ten miles of road, was required to value the right of way unimproved, the right of way with ties and rails laid upon it, and the total value? What gives the ten miles of track their real value is the franchise of the corporation operating them, the connections in and out of the state, and the fact that they are part of a great system of railway, operated as a whole. An attempt to assess the track of a railway in any one county by the statutory method of assessing houses and lots would produce gross inequality, and enable the most valuable features of railroad properties to escape taxation. It is said that the scheme of dividing the total value by the number of miles in any county is arbitrary. But the real question is whether it provides a reasonable mode of ascertaining the value of that portion of a railroad lying in a given county, so as to insure that the corporation contribute its just proportion of the public revenues. The track in any one county is not an

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entity. It is merely part of a whole, spreading over many counties, or even many states. The value of each such part is obviously the proportion which it bears to the whole. Viewed by itself, apart from its place in the whole, it is merely a ditch and grade, bearing ties and old iron.

The third objection is that the system provided by the sections in question "exempts railroad property assessed by the State Board of Equalization from the payment of its proportion of the taxes levied for the support of the county, school district, and city, appellants in this action, and thereby violates the rule of uniformity prescribed by section 1, art. 9, of the Constitution." As the municipality in question is not a city of the metropolitan class nor of the first class, in which different standards of assessment prevail from those employed in the state at large, this case does not involve the question expressly left open by the opinion of Holcomb, J., in *State v. Savage*. Here the same assessment serves for county and municipal purposes alike as to all property. Of course, the presumption is that both the board of equalization and the local assessors act fairly and impartially, and fix a just and true valuation. *State v. Savage*, *supra*. Hence the question is whether, assuming that they do so, a proper proportion of the burdens of municipal taxation is thrown upon the railroad companies. This question depends upon the view taken as to the nature of railroad property. If the railroad is an entity, we have one piece of property spreading over several counties; if that portion within each county is a separate entity, then a valuation of such separate entity should be made in each county, as in other cases. We do not think this matter admits of debate. Bridges, depots, water tanks, roundhouses, and other necessary structures upon the right of way are as much part of the railroad as a whole as a permanent building upon land is annexed to and a part of the land. They have no separate existence apart from the road, but go to make up the one entity called the railroad. So thoroughly is this true that they will pass by mortgage or conveyance of the road without being named expressly. *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 7 Sup. Ct. 1206, 30 L. Ed. 1210; *United States Trust Co. v. Wabash, St. L. & P. R. Co.* (C. C.) 32 Fed. 480. If, as held in the latter case, a hotel on the right of way of a railroad, operated in connection therewith for the accommodation of its patrons, is a mere appurtenance to the road, covered by conveyance of the road, without express mention, how much more is this true of bridges, depots, and the like. But if these are not separate entities, to be dealt with apart from the road as such, it follows that the municipality cannot claim to have within its borders certain specific railroad property, but only a certain proportion of the whole road. This is the view taken by the statute, and we think it well founded and reasonable. Apart from the road as a whole,

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the bridge is only so much junk; severed from the road, the depot is of little or no value. Each is made specially to be a part of the whole line, and to treat it as a separate entity is to take away its chief value. If the road as a whole is valued correctly, the several portions in each county cannot fail to be justly valued when assessed at the proportion they bear to the whole. *Adams Express Co. v. Ohio*, 165 U. S. 194, 220, 17 Sup. Ct. 305, 41 L. Ed. 683, and cases cited.

Finally, it is said that the statute makes a classification not authorized by the Constitution. In our view, the classification is made, not by the statute, but by the nature of the subjects dealt with. They are intrinsically and fundamentally distinct, and the Legislature, which is given the power expressly to fix the mode of assessment as it may direct, has adopted a method which has been in operation many years, has been readopted in the new revenue law, and is reasonably calculated to meet the problem in hand. Any method would doubtless be open to some objection in its practical workings. But if the method chosen may be carried out so as to produce uniformity of taxation in proportion to the value of property, as contemplated by the Constitution, it is constitutional and valid.

Two further objections to the statute have been urged by counsel who appear as friends of the court. The first is that it operates unequally and unreasonably with respect to railroad companies whose tracks are situated wholly within one county; such, for example, as terminal and belt-line companies. The arguments advanced on this ground, however, apply rather to the constitutionality of provisions in the several statutes governing municipalities, whereby the valuation of railroad properties for state and county purposes is required to be taken as a basis of assessment in such municipalities made on a different basis, than to the constitutionality of the general statutory provisions with reference to state and county assessments. So far as they apply to the sections here in question, we think they are met sufficiently by what has been said already. The other objection is that the statute contravenes the constitutional guaranties that no person shall be deprived of property without due process of law, in that it does not provide for notice to the companies assessed of the meeting of the State Board of Equalization, and does not provide for notice to other taxpayers of the meeting of such board, in order that they may insist upon proper equalization of their assessments with those of the companies in question. The statute provides a date upon which railroad companies within the purview of the act shall make returns. It provides a place where the meeting of the State Board of Equalization shall be held, and provides expressly that such meetings shall take place as soon as practicable after the returns are filed. These provisions must be construed, if possible, in such manner as to make them consti-

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tutional and valid. If the statute had said that the meeting should be held immediately upon the return required to be made by the railroad companies, there could be no question that the time and place were stated with sufficient certainty. But it is well settled that "immediately" means "as soon as practicable," and conversely it is proper to construe "as soon as practicable" to mean "immediately." *Huff v. Babbott*, 14 Neb. 150, 15 N. W. 230; *Lydick v. Korner*, 13 Neb. 10, 12 N. W. 838. So long as the time and place of the meeting of the State Board of Equalization are thus fixed with such certainty as to enable the companies to know by reference to the statute at what time and at what place their properties will be assessed and valued, we perceive no merit in the objection. The State Board of Equalization is a public board. Its meetings are public, and as a matter of fact and practice the corporations have always been accorded a hearing before it. Where the statute names the time and place for the meeting of the assessing board, personal notice is not necessary. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; *State Railroad Tax Cases*, 92 U. S. 610, 23 L. Ed. 663; *Pittsburg, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031. If returns are made as required by the statute, all citizens are advised by the terms of the statute as to the time and place of the meeting of the State Board of Equalization. If any company fails to make a return, five days are provided for during which the delinquent return may be received. At the expiration of such five days, the auditor, a public officer, is required to obtain the necessary information, and a meeting of the State Board of Equalization is to be held "as soon as practicable," or, in other words, "immediately." These provisions of the statute would seem to afford other taxpayers a sufficient opportunity to be heard with reference to the assessment of the companies in question for the purpose of insuring uniformity and equality in taxation. The practice has always been in accordance with this interpretation of the statute, and we think the sections in question will reasonably bear such construction.

We therefore recommend that the decree be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

SWIFT et al. v. DELAWARE, L. & W. R. CO. et al.

(Court of Errors and Appeals of New Jersey, Sept. 30, 1904.)

[58 Atl. Rep. 939.]

Railroads — Grade Crossings — Maintenance — Private Contracts —
Police Power—Injunction.

A contract between a railroad and private persons for the permanent

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maintenance of grade crossings over certain streets in a city, so far as the right of specific performance is concerned, is subject to the duty of the railroad company to the public and to the police power of the state, vested by P. L. 1893, p. 157, in the authorities of the city, and hence, such authorities and the railroad company having determined that the crossings unnecessarily endangered public travel, an injunction forbidding their removal will not be granted.

Appeal from Court of Chancery.

Bill by Edwin C. Swift and others against the Delaware, Lackawanna & Western Railroad Company and others. From a decree denying an injunction, complainants appeal. Affirmed.

Riker & Riker, for appellants.

McCarter, Williamson & McCarter, for respondents.

PER CURIAM. We concur in that part of the opinion delivered in this cause by the learned vice chancellor (57 Atl. 456) which holds that the alleged contract between the defendant railroad company and private persons for the permanent maintenance of grade crossings over certain streets in the city of Newark must, so far, at least, as the right to specific performance is concerned, be deemed subject to the public duty of that company and to the police power of the Legislature vested by the act of 1893 (P. L. p. 157) in the municipal authorities of the city to secure the safety of public highways. The authorities of the city and of the railroad company having both determined that those crossings unnecessarily endangered public travel, we think on that ground an injunction forbidding their removal was rightly refused. This being our conclusion, we refrain from expressing either concurrence in or dissent from the other propositions set forth in that opinion.

SAGER *v.* ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Kansas, Jan. 7, 1905.)

[79 Pac. Rep. 132.]

Accident at Crossing—Person Struck by Gate.

A railway track crossing a public street is not a warning to a traveler going over it of danger resulting from the negligence of a gate keeper in allowing an arm of the gate to descend to the injury of the person crossing the track.

Same—Open Gates.*

Open gates, tended by a gate keeper of a railway company, where a public street crosses its tracks, are an affirmative assurance to a traveler on the street that his safety in crossing will not be imperiled by the descent of a gate arm.

Same—Person Struck by Gate—Contributory Negligence.

After a traveler in a buggy driving two horses on a public street at a

*See note at end of case.

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railway crossing had passed over the railway tracks, one arm of a gate in front of him was allowed by the gate keeper to descend across the buggy in which he was riding. In an action for personal injuries against the railway company the question of contributory negligence should have been confined to the care exercised by the traveler to avoid injury at and after the time when the gate arm began to descend.

(Syllabus by the Court.)

Error from District Court, Reno County; M. P. Simpson, Judge.

Action by C. F. Sager against the Atchison, Topeka & Santa Fe Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Waters & Waters, for plaintiff in error.

A. A. Hurd and O. J. Wood, for defendant in error.

SMITH, J. Main street in the city of Hutchinson is crossed by the tracks of the Atchison, Topeka & Santa Fe Railway Company at a place where there is much travel along the street. Gates, operated by compressed air applied by a gate keeper, are maintained by the railway company to guard the crossing. The gates are wooden arms, which, when raised, stand perpendicular at the sides of the street; when lowered during the movement of trains, the arms meet near the center of the roadway, forming an effectual barrier against the passage of teams or vehicles over the railway. There are two of these arms at the south side of the railway crossing and two on the north side, which, when lowered, reach over the street. Main street runs north and south. The railway tracks cross it at right angles. In August, 1900, plaintiff below was driving two horses to a buggy, going north along Main street. When he approached the railway crossing the gates on the south side were up, indicating that the tracks were clear for passage over them. There was testimony tending to show that the west arm of the north gate was raised—standing straight up—when plaintiff below crossed the railway tracks going north; that he did not see the east arm until it was lowered before his face about four feet in front of him; that he dodged back, and an iron prod or rest attached to the wooden arm of the gate struck him in the groin. For the injury alleged to have been thus sustained this action was brought against the railway company. There was a general verdict in favor of the company. Sager has instituted proceedings in error here to reverse the judgment.

The trial court refused to give the two following instructions requested by the plaintiff below: "No. 5. I instruct you that a person has the right to cross a railway crossing at a public street, and is not required to look out for or anticipate that an arm of the gate crossing will fall or be let fall on him as he is about to leave the crossing." "No. 7. It was the duty of the gateman at that crossing to shut the gates to

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prevent passing vehicles from entering on the tracks on the unexpected approach to the crossing of engines, cars, and trains, and to open the gates for the crossing of travel at such time as it could cross in safety, upon the tracks being cleared and remaining cleared, from the expected approach to the crossing of such engines, cars, and trains; and that the open gate on the raising of the gate would be an invitation to travel that this crossing was clear, and that it could cross, and a person under such circumstances would have the right with his vehicles to start to cross."

Counsel for the railway company, in defending the action of the court below refusing instruction No. 5, above set out, invoke the general rule that a railway track itself is a warning of danger, and that a traveler, before crossing, must exercise his faculties of sight and hearing to determine whether he can proceed with safety. Conceding the rule, it can have no application to the facts of this case. Sager was not injured by a passing train. A failure to look and listen before crossing a railway has never been held by this court to constitute contributory negligence, except in cases where the traveler on the highway was injured or killed by a train moving on the tracks. The contention of counsel for defendant in error, if followed out, would lead to the conclusion that railway tracks at a road crossing are a warning to a person going over them—a notification in advance—of every species of negligence which the company or its servants might be guilty of in any or all departments of its business. The absurdity of this argument is evident when considered in its application to hypothetical cases. The signal of danger given by the presence of railway tracks would certainly not impose on a person passing over them on the highway the duty of looking and listening for the approach of a mad steer, which, by negligence of the company's servants, had escaped from a cattle car, ran along the track, and gored the traveler at the crossing. Nor would such warning effect in any degree the right to recover for injuries sustained by reason of a servant of the company negligently running a truck against another to his damage. Nor would any number of tracks in sight of an intended passenger have the slightest influence in defeating a recovery against the company for an assault and battery on him by its ticket agent. In the present case no injury was received until after Sager had crossed the tracks going north. His cause of action rested on the negligence of the gateman in letting down the east arm of the north gate after the two south arms of the gate and the railway tracks had been passed. The only question of contributory negligence which could possibly come into the case under the evidence before us must have relation to the knowledge of plaintiff below respecting the falling of the gate which hurt him. If he neglected to avoid the injury,

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when it was imminent, by stopping his horses or jumping from his buggy, provided he had sufficient notice of the impending danger, and it was practicable to do so, he was guilty of contributory negligence. His negligence, if any, is to be determined by ascertaining what he omitted to do that was legally required of him immediately after the gate arm which struck him began to descend. The gates were erected by the railway company for the security of persons having occasion to use the crossing. The open gates at the south side were an affirmative assurance that it was safe to go over. Plaintiff below drove over the tracks without delay. We can see no element of contributory negligence in the case unless it might have arisen at or about the time the east arm of the north gate began to descend, as before stated.

Instruction No. 7, copied above, which was refused, is somewhat involved in its phraseology, yet it states the law fairly. Nowhere in the instructions given did the court inform the jury concerning the duty of the gate keeper or the traveler at the crossing. The nearest approach to the relative duties of each is found in instruction No. 4. It reads: "You are instructed that, as the gates of the defendant are over a public highway, that not only must the defendant use due care and caution in handling the gates, but parties using the highway must also use due care and caution with reference to the presence of the gates and their operation; and if persons using the highway are also guilty of carelessness which contributed to their injury in passing along the street where the gates are located, it would constitute contributory negligence, and the party or parties could not recover although he or they in fact received an injury, and that by the negligence of the defendant." The respective care required to be exercised by the parties is here stated in the most general way. The court referred to the contributory negligence of plaintiff below four times in the instructions given, but in no manner particularized respecting the right of the traveler to cross under the circumstances of this case without anticipating that an arm of a raised gate would fall upon him, as set forth in instruction No. 5, which was refused. The following language in the last instruction mentioned was misleading, to wit: "If persons using the highway are also guilty of carelessness which contributed to their injury in passing along the street where the gates are located, it would constitute contributory negligence." If instructions numbered 5 and 7, requested by counsel for Sager, had been given, no doubt could have remained in the minds of the jury whether it was a negligent act for plaintiff below to go over the railway crossing. It might be inferred from the directions given that the mere passing over the crossing of itself under the circumstances showed contributory negligence on the part of Sager. Such is the theory

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of counsel for defendant in error in this court, and the same view was probably taken by the trial court.

The judgment of the court below will be reversed, and a new trial granted. All the Justices concurring.

NOTE.

**CROSSINGS—CARE REQUIRED OF HIGHWAY TRAVELER
AS AFFECTED BY FACT THAT SAFETY GATES
ARE OPEN.**

OPEN SAFETY GATES AS AN INVITATION TO CROSS.

The fact that the safety gates at a railroad crossing are open is an invitation to the travelling public to come on, and an intimation to them that they may cross the tracks in safety.

United States.—*Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 27 Fed. 159.

District of Columbia.—*Baltimore & P. R. Co. v. Carrington (D. C.)*, 3 App. Cas. 101.

Illinois.—*Chicago & A. R. Co. v. Wise*, 106 Ill. 453, 69 N. E. 500, 10 R. R. 8, 33 Am. & Eng. R. Cas., N. S., 8.

Indiana.—*Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843.

Maine.—*Hooper v. Boston & M. R. Co.*, 81 Me. 260, 17 Atl. 64.

Maryland.—*Baltimore & O. R. Co. v. Stumpf (Md.)*, 54 Atl. 978, 9 R. R. 203, 32 Am. & Eng. R. Cas., N. S., 203.

Massachusetts.—*Merrigan v. Boston & A. R. Co.*, 154 Mass. 189, 28 N. E. 149; *Conaty v. New York, etc., R. Co.*, 164 Mass. 572, 42 N. E. 103.

Michigan.—*Evans v. Lake Shore & M. S. R. Co., etc.*, 88 Mich. 442, 50 N. W. 386.

New Jersey.—*Smith v. Atlantic City R. Co. (N. J.)*, 49 Atl. 547, 22 Am. & Eng. R. Cas., N. S., 268.

New York.—*Lindeman v. New York C. & H. R. Co.*, 11 N. Y. St. Rep. 837; *Fitzgerald v. Long Island R. R. Co.*, 10 N. Y. St. Rep. 433; *Palmer v. Railroad Co.*, 112 N. Y. 234, 19 N. E. 678; *Oldenburg v. York Cent. & H. R. Co.*, 124 N. Y. 414, 26 N. E. 1021; *Glushing v. Sharp*, 96 N. Y. 678.

Ohio.—*Railway Co. v. Schneider*, 45 O. St. 678, 17 N. E. 321.

Rhode Island.—*Wilson v. N. Y., etc., R. R.*, 18 R. I. 491, 29 Atl. 258.

Wisconsin.—*Rohde v. Chicago & N. W. Ry. Co.*, 86 Wis. 309, 56 N. W. 872.

England.—*Directors, etc., of Northeastern Ry. Co. v. Wanless*, 7 Eng. & Irish Appeals, 12; *Lunt v. London & N. W. Ry. Co.*, L. R. 1 Q. B. 277.

OTHER STATEMENTS, AND ILLUSTRATIONS, OF DOCTRINE.

DISTRICT OF COLUMBIA.

Gates Not Required by Law.

In *Baltimore & P. R. Co. v. Carrington (D. C.)*, 3 App. Cas. 101, it is held that where a railroad company has maintained a gate at a crossing for a number of years, although not required by law to do so, persons using the crossing constantly have the right to assume that no trains are coming when the gate is up.

ILLINOIS.

Immaterial Whether Person Comes on Street within or without the Gates.

In *Chicago & A. R. Co. v. Wise*, 106 Ill. 453, 69 N. E. 500, 10 R. R. 8, 33 Am. & Eng. R. Cas., N. S., 8, it is held that a municipal ordinance requiring railroads to maintain gates at street crossings, and making it the duty of persons operating the gates to warn persons of the approach to the crossings of any engine, and authorizing railroad companies owning and operating separate tracks across a street in close proximity

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to each other to unite in the maintenance of gates at the crossings, to be operated from a tower, affords protection to all persons who cross any of those tracks, no matter where they come on the street, whether within or without the gates.

INDIANA.

May Act on Presumption of Safety.

In *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843, it is held that where a railroad company, in pursuance of a city ordinance, has erected gates and stationed a watchman at a street crossing, a traveler who approaches the crossing and finds the gates open and receives no warning from the watchman, has a right to assume that there are no approaching trains, and if, acting upon this presumption, he enters upon the crossing and is instantly confronted by trains going in opposite directions, and, in the confusion caused by the unexpected danger into which he is thus led, is struck and killed, the railroad company is liable.

MICHIGAN.

Not Negligence to Act on Presumption of Performance of Duty by Gateman.

In *Evans v. Lake Shore & M. S. R. Co., etc.*, 88 Mich. 442, 50 N. W. 386, it is held that when gates are provided by railroad companies at street crossings, the public have a right, the gates being open, to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duties, and are not negligent in acting upon the presumption that they are not exposed to a danger which could only arise from a disregard of such duties.

NEW YORK.

Open Gates as Notice of Safety.

In *Lindeman v. New York C. & H. R. Co.*, 11 N. Y. St. Rep. 837, it is held that the fact that the gates at a railroad crossing are open is equivalent to a statement and notice to the public that it is safe to cross at that time.

Open Gates as a Substantial Assurance of Safety.

In *Fitzgerald v. Long Island R. R. Co.*, 10 N. Y. St. Rep. 433, it is held that a raised crossing gate is a substantial assurance to a traveler on the street that the railroad tracks may be crossed in safety, and just as significant as if the gateman had beckoned to him or invited him to come on.

In *Glushing v. Sharp*, 96 N. Y. 678, the court said: "The open gate was a substantial assurance of safety—just as significant as if the flagman had beckoned or invited him to come on—and that an ordinarily prudent man would not be influenced by it is against all human experience."

Open Gates a Direct and Positive Assurance of Safety.

In *Palmer v. Railroad Co.*, 112 N. Y. 234, 19 N. E. 678, it is said in the opinion: "It is obvious that an open gate was a direct and explicit assurance to the traveler that neither train nor engine was rendering the way dangerous,—that none was passing. As closed gate was an obstruction preventing access to the road; an open gate was equally positive in the implication to be derived from it that the way was safe. Nothing less could be implied, and no other conclusion could be drawn, from that circumstance."

Open Gates as Significant as a Direct Invitation from the Gateman—Duty to Look Out for Danger.

In *Oldenburg v. York Cent. & H. R. R. Co.*, 124 N. Y. 414, 26 N. E. 1021, it is said in the opinion: "As said by this court in a recent case: 'The raising of the gate was a substantial assurance to him of safety, just as significant as if the gateman had beckoned to him or invited him to come on, and that any prudent man would not be influenced by it is against all human experience.'" *Glushing v. Sharp*, 96 N. Y. 676. Or as laid down in a still later case: "The open gate was an affirma-

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tive and explicit declaration and representation that neither train nor locomotive was approaching with intent to pass." (*Palmer v. N. Y. C. & H. R. R. Co.*, 112 N. Y. 234, 19 N. E. 678.) "While the deceased had the right to rely to a certain extent upon the assurance thus given by the defendant that it was safe for him to go on, it was still his duty to be on the lookout for danger, and to exercise the same care that a man of ordinary prudence would have exercised under the same circumstances."

Right to Assume That Backing Engine Will Stop before Arriving Opposite Open Gates.

In *Lindeman v. New York C. & H. R. R. Co.*, 42 Hun (N. Y.) 306, it is said in the opinion: "The opening of the gates is an affirmative act giving every traveler to know that the crossing is safe; and though he should see an engine backing at about the rate of a rapid walk, he might think it would stop before it reached the place where the company had, by their signal, said the engine was not to go."

OHIO.

May Pass through Open Gates and Attempt to Cross without Stopping to Listen.

In *Railway Co. v. Schneider*, 45 Ohio St. 678, 17 N. E. 321, a case which related to a fatal injury received at a grade crossing, and the deceased was held not to have been guilty of contributory negligence, because "an open gate, with a gateman in charge, is notice of a clear track and safe crossing; and, in the absence of other circumstances, when the gates are open and the gateman present, it is not negligence in the person approaching * * * to pass on to the track, through the open gates, without stopping to listen."

RHODE ISLAND.

Contributory Negligence Made a Question for Jury.

In *Wilson v. N. Y.*, etc., R. R., 18 R. I. 491, 29 Atl. 258, Chief Justice Matterson said: "The word 'invitation,' though sometimes used in the opinions of learned courts, evidently was designed to mean only that the leaving open of the gates amounted to an implied assurance that the track might be safely crossed. Thus understood the authorities are numerous (the only cases to the contrary that have come to our attention being cases in Pennsylvania) that open gates, or the absence of the usual signals of an approaching train or engine, are implied assurances that no train or engine is approaching the crossing with intent to cross the street upon which travelers on the street have a right to rely; and that if a traveler on the street be injured, while crossing the railroad in such circumstances, the question whether he was guilty of contributory negligence was for the jury."

In *Rohde v. Chicago & N. W. Ry. Co.*, 86 Wis. 309, 56 N. W. 872, it is said in the opinion: "The open gate (at railroad crossing), was an assurance to the public that there was no danger, and an invitation to cross in safety. *Glushing v. Sharp*, 96 N. Y. 676; *Palmer v. N. Y. & H. R. R. Co.*, 112 N. Y. 234, 19 N. E. 678; *Evans v. L. S. & M. S. R. Co.*, 88 Mich. 442, 50 N. W. 386. If plaintiff proves that he accepted the invitation, and thereby put himself in a position of imminent peril (where he would not have been had the gates been lowered), and was injured by defendant's negligent act, no contributory negligence appearing, he establishes a cause of action."

PENNSYLVANIA.

Even in Pennsylvania, where the traveler is held to stricter account than in any other state, in the case of *Roberts v. Del. & Hudson Canal Co.*, 177 Pa. 190, 35 Atl. 723, the following instruction was held correct: "Safety gates, which should be closed in case of danger, standing open, are an invitation to the traveler on the highway to cross; and while this fact does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances."

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ENGLAND.

Equivalent to Direct Invitation from Gateman.

In *Lunt v. London & N. W. Ry. Co.*, L. K. 1 Q. B. 277, Lord Blackburn observed: "It could make no difference whether the gate keeper expresses that the road is safe, by opening the gate, or by words or gestures."

In *Directors, etc., of Northeastern Ry. Co. v. Wanless*, 7 Eng. & Irish Appeals, 12, it was held that where it was the duty of the railway to keep the gates closed when any train is approaching that the fact that they were open "amounted to a statement and notice to the public that the line at that time was safe for crossing, and was evidence of negligence to go to the jury."

SUCH AN INVITATION NO EXCUSE FOR FAILURE TO EXERCISE CARE REQUIRED BY OTHER CIRCUMSTANCES.

But the mere fact that crossing gates are open cannot alone, and in all cases, justify a traveler in going upon the track at the crossing; and there are cases in which it may be the traveler's duty to make independent observation by stopping as well as by looking and listening, before doing so.

Maine.—*Romeo v. Boston & M. R.*, 87 Me. 540, 33 Atl. 24.

Maryland.—*Maryland Cent. R. Co. v. Newbern*, 19 Am. & Eng. R. Cas. 261, 62 Md. 391.

Massachusetts.—*Merrigan v. Boston & A. R. Co.*, 154 Mass. 189, 28 N. E. 149.

Michigan.—*Dawe v. Flint & Pere Marquette R. Co.*, 102 Mich. 307, 60 N. W. 838.

New Jersey.—*Pennsylvania R. Co. v. Pfuelf*, 60 N. J. L. 278, 37 Atl. 1100, 7 Am. & Eng. R. Cas., N. S., 738; *Smith v. Atlantic City R. Co.* (N. J.), 49 Atl. 547, 22 Am. & Eng. R. Cas., N. S., 268.

New York.—*Shultz v. New York Cent. & H. R. R. Co.* (Sup. Ct.), 69 Hun 515, 23 N. Y. Supp. 509; *Fitzgerald v. Long Island R. Co.*, 10 N. Y. St. Rep. 433; *Weed v. New York Cent. & H. R. R. Co.*, 36 N. Y. Supp. 98.

Rhode Island.—*Wilson v. N. Y., etc., R. R.*, 18 R. I. 491, 29 Atl. 258.

STATEMENTS AND ILLUSTRATIONS AS TO CARE REQUIRED OF HIGHWAY TRAVELER.

UNITED STATES.

Effect of Custom to Keep Gates Closed at Night.

In *Baltimore & Potomac R. Co. v. Landrigan* (U. S.), 24 Sup. Ct. Rep. 137, 11 R. R. R. 716, 34 Am. & Eng. R. Cas., N. S., 716, it is held that an instruction as to the effect of closed gates at a railway crossing as notice of danger to a person attempting to cross the tracks is not erroneous where it tells the jury that if the gates were generally kept down at night without regard to the presence or absence of passing trains, and the pedestrian had knowledge of that fact, then the circumstance that the gates were down when he was run over in attempting to cross the tracks at night was not of itself a warning to him of the presence of danger, and that contributory negligence could not be imputed to him from that fact alone.

Obstructed View—Traveler Not Entirely Relieved of Duty to Exercise Care.

While the fact of open crossing gates is a circumstance which a highway traveler may properly take into consideration, and upon which he may place some reliance, this does not relieve him of all care; and this rule is especially applicable where the traveler's view was unobstructed, and the slightest exercise of care on her part would have prevented the accident. So held in *Romeo v. Boston & M. R.*, 87 Me. 540, 33 Atl. 24.

May Prevent Nonsuit.

Although a collision at a railroad crossing is prima facie evidence of negligence on the part of the traveler, such inference may be repelled; and an open gate, which invites passing, and an obstructed view, may be sufficient to bring the question of negligence within the province of

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the jury to decide, and prevent a nonsuit, or setting aside a verdict for plaintiff. So held in *Hooper v. Boston & M. R. Co.*, 81 Me. 260, 17 Atl. 64.

Gates Required by Circumstances, but Not by Law—To What Extent a Traveler May Rely on Company's Performance of Duty.

In *State v. Boston & M. R. Co.*, 80 Me. 430, 15 Atl. 36, it is said in the opinion: "The counsel for the defendants contends that the standing arms, indicating open gates, should not be regarded as any signal, or a sufficient signal, of safety, at any crossing where the law does not require gates to be maintained. At this place the gates were erected by the voluntary act of the company. But is it not a fair construction of the statute to say that it does require gates to be maintained, or a flagman to be present, at all grade crossings, as to trains moving more rapidly at such places than six miles an hour? And while a neglect of the company to perform its duties does not excuse the traveler in a neglect of the duties and degree of care which the law imposes on him, still, in making his calculation for crossing a railroad track safely, he is often justified in placing some reliance on a supposition that the company will perform the obligation resting on it, where there is no indication that it will do the contrary. If the gates were open and the crossing unattended by a flagman, then these persons (occupants of vehicle) had a right to accept the fact as some evidence that the train would not attempt to pass the crossing at a faster speed than six miles an hour. Of course, full reliance cannot always be placed on an expectation that a railroad company will perform its duties, when there is any temptation to neglect them, because experience teaches us that it would not be impracticable to do so. But such an expectation has some weight in the calculation of chances, greater or less according to the circumstances. But what essential difference can it make in the relation of the parties whether the statute requires a flagman at any point or whether absolute necessity required one; whether the legislature declares the necessity, or the company by its act confesses the necessity."

MARYLAND.

Stop, Look and Listen—Instruction Ignoring Implied Assurance of Safety.

In *Baltimore & O. R. Co. v. Stumpf* (Md.), 54 Atl. 978, 9 R. R. R. 203, 32 Am. & Eng. R. Cas., N. S., 203, it is held that where defendant railroad company maintained safety gates at a grade crossing in a city, at which plaintiff was injured by defendant's failure to have the gates closed while the train which struck plaintiff was traveling over the crossing, requested instructions as to plaintiff's duty to stop, look and listen before going on the track, and to know when a train was coming, which ignored the implied assurance of safety from the open gates, were properly refused.

MASSACHUSETTS.

Gates Partially Raised in Traveler's Presence—Not Guilty of Contributory Negligence as Matter of Law.

In *Conaty v. New York, etc., R. Co.*, 164 Mass. 572, 42 N. E. 103, an action for personal injuries sustained by the driver of a team at a railroad crossing, it was held that he, after waiting for several minutes in front of the closed gates, while several trains passed in each direction, had a right to consider the raising of the gates one-half or three quarters of the way up as an indication that the crossing was free; and as, when he started to cross, he did not omit to look for approaching trains and another team crossed in safety after the gates began to rise and before the plaintiff was struck, it cannot be said as matter of law that he was negligent. In this case it is said in the opinion: "A person who is about to cross a railroad is not under all circumstances obliged to stop, look and listen. *Clark v. Boston & M. R. Co.*, 164 Mass. 434, 41 N. E. 666. Acts of a gateman or signal man which tend to mislead a traveler into the belief that he may cross in safety, invitation express or implied are to be taken into account."

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Duty to Look for Trains—Care Required of Traveler Affected by Existence of Open Gates.

In *Merrigan v. Boston & A. Co.*, 154 Mass. 189, 28 N. E. 149, it is held that in an action for personal injuries sustained by a traveler at a railroad crossing, an instruction that the existence there of gates, seemingly intended to be closed when trains pass, did not excuse him from looking before crossing, but that he had a right to take the fact into consideration on the question to what extent he would look, was correct.

MICHIGAN.

Failure to Look for Trains on Farther Track after Train on Nearest Track Had Passed by Open Gates.

In *Pennsylvania R. Co. v. Pfuell*, 60 N. J. L. 278, 37 Atl. 1100, 7 Am. & Eng. R. Cas., N. S., 738, it appeared that, though the safety gates were up as plaintiff approached the crossing, an east-bound train was then passing, and he waited until it passed, and then went upon the track, and was struck by a train coming from the opposite direction, which he could not have failed to see if he had looked. It was held that it was his duty to look and listen before he reached the farther track; that the fact that he walked on such track in front of the train was conclusive evidence that he did not look, and he was therefore chargeable with contributory negligence, and a verdict should have been directed for defendant.

Failure to Look—Traveler with Knowledge That Gates Did Not Fall for Yard Engine.

In *Dawe v. Flint & Pere Marquette R. Co.*, 102 Mich. 307, 60 N. W. 838, it appeared that deceased walked a distance of forty-eight feet after passing an open railroad gate at a street crossing, and before reaching the track, where she was struck by a passenger train, during which time she could have seen the train for a distance of four hundred and twenty-five feet if she had looked in the direction from which it was coming. It was held that the rule that a party approaching a railroad track has a right to rely upon the absence of such warnings of danger as it is shown to be the custom of the railroad company to give, did not excuse the negligence of deceased, who testified that she thought the gates did not fall for a yard engine; for if she was looking for a yard engine, as she testified, she could as easily have seen the passenger train.

NEW JERSEY.

Traveler Struck by Gate—Question for Jury.

In *Smith v. Atlantic City R. Co.* (N. J.), 49 Atl. 547, 22 Am. & Eng. R. Cas., N. S., 268, it appeared that plaintiff, at the railway crossing of a city street, as she reached the end of the crossing, was struck by a descending safety gate, and was severely injured. The gates were open when she began to cross, and she failed to notice the lowering of the gates before she was struck. The gateman did not see her, but there was no obstruction of his view of her while she was crossing. On the trial of the action against the company, motion to nonsuit and to direct a verdict were made and denied. It was held, that, in view of the fact that the open gate was an invitation to the plaintiff to cross, and that notwithstanding this it was still her duty to look and listen for trains, and to extend her observation to approaching vehicles and to the safety of her path, the question of contributory negligence, in failing to look further at the gates, was properly submitted to the jury.

NEW YORK.

Traveler Must Still Take Reasonable Precautions.

In *Shultz v. New York Cent. & H. R. R. Co.* (Sup. Ct.), 69 Hun. 515, 23 N. Y. Supp. 509, it is said in the opinion: "Still the fact that such gates were open does not relieve the traveler from taking proper precautions for his own safety. It is still his duty to be on the lookout for danger, and to exercise the same care that a man of ordinary prudence

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would have exercised under the same conditions. *Oldenburg v. Railroad Co.*, 124 N. Y. 414-418, 26 N. E. 1021. The traveler is still bound to exercise ordinary and reasonable care, but the measure of his duty varies with the particular circumstances of the case, and its fulfillment must be determined by the jury. *Palmer v. Railroad Co.*, 112 N. Y. 245, 19 N. E. 678. The assurance of safety given by open gates may also be modified or increased by circumstances, as when they are opened in the view and presence of the approaching traveler."

Obstructed View—Gates Raised in Traveler's Presence—Accident Caused by Closing of Gate on Other Side.

In *Kane v. New York, N. H. & H. R. Co.* (Sup. Ct.), 9 N. Y. Supp. 879, it appeared that plaintiff, while attempting to drive across railroad tracks at a street crossing, was struck by a train going south, the approach of which was obscured by a train going north; that he had been waiting to cross while the north-bound train was passing, and seeing the gates go up, attempted to cross, but was shut in upon the track by the closing of the gate on the opposite side. It was held that the question of his contributory negligence was for the jury.

Knowledge That Gates Are Not Operated between Certain Hours.

In *Weed v. New York Cent. & H. R. R. Co.*, 36 N. Y. Supp. 98, it is held that where a person is familiar with the locality, and has knowledge of the fact that a railroad company is not accustomed to operate its crossing gates between certain hours, he cannot rely on the open gate as an assurance of safety when he approaches the crossing between such hours.

In *Rainey v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 80, 68 Hun 495, an action for killing a person at a crossing where safety gates were maintained, between eight and nine o'clock in the evening, the evidence showed that the gates were not operated after seven o'clock in the evening. It was held that if deceased knew the time at which the gates ceased to be operated he was not entitled to rely upon them for protection.

ENGLAND.

Boys Struck by Train on Farther Track after Escaping Train on First Track.

In *Wanless v. R. R. Co.*, L. R. 6 Q. B. (Eng.), 481, it appeared that the wagon gate at a crossing was opened and fastened back and two boys entered it on foot and started to cross the track. As they were about to step on the track a freight train passed rapidly, which they escaped. Just as the last car passed them they stepped across, and while on the next track were run down by a train coming from the other direction. It was held a case for the jury. Kelly, C. B., said: "It is the opinion of the majority of the court that it was the duty of the defendant to keep these gates across the road shut when any trains were expecting to pass, and that they should be left open when no trains were expected; and that whenever the gates, or either of them, are left open, it is an intimation to the public who may have to pass along the railway either upon foot or with carts and carriages, that they can pass in safety. Bramwell, J., alone dissented.

PENNSYLVANIA DOCTRINE.

Duty to Stop, Look and Listen Not Affected by Fact That Gates Are Open.

In *Lake Shore & M. S. Ry. Co. v. Frantz*, 127 Pa. St. 297, 18 Atl. 22, it is held that the duty of a highway traveler to stop, look and listen before attempting to cross railroad tracks is absolute and imperative, and the fact that the safety gates are raised does not relieve him from its observance.

Open Gates No Excuse for Failure to Take Ordinary Precautions.

In *Greenwood v. Phila. W. & B. R. Co.*, 124 Pa. St. 572, 17 Atl. 188, it appeared that when the vehicle in which plaintiff was riding approached the crossing, the gates were up, and the watchman displayed no light and gave no warning. And it is said in the opinion: "Under

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such circumstances does the case come within the familiar rule, 'stop, look and listen?' It was strongly urged upon the argument that the rule referred to does not apply for the reason (a) that the plaintiff had a right to rely upon the fact that the safety gates were up, and (b) that the said rule is not applicable to towns and cities where trains are constantly crossing streets. I do not understand the law to be that when a railroad company adopts safety gates or any other appliance for the protection of the public, that the public are thereby absolved from the duty of taking care of themselves. Conceding that the company was required to take extra precautions by reason of the gates being out of order, yet the plaintiff was also bound to do his part. He has no right to omit the ordinary precautions when approaching a railroad crossing merely because he finds the gates up."

Fact to Be Considered by Jury in Determining Question of Contributory Negligence.

But in *Roberts v. Delaware & H. Canal Co. (Pa.)*, 5 Am. & Eng. R. Cas., N. S., 664, it is held that safety gates, which should be closed in case of danger, if standing open, are an invitation to the traveler on the highway to cross; and while the fact that such gates are open does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances.

Open Gates, Direct Invitation from Flagman, and Obstructed View—Question for Jury.

In *Fennell v. Harris (Pa.)*, 9 Am. & Eng. R. Cas., N. S., 709, it appeared that the driver of a vehicle upon reaching a railroad crossing, the gates of which were open, stopped and listened, and then, being signaled by the flagman to cross, attempted to do so; but was injured by defendant's train, which approached without warning from a certain direction, the driver's view of the tracks in that direction being obstructed, it was held that it was error to hold that plaintiff was guilty of contributory negligence; and that the case should have gone to the jury.

Injured at Crossing after Walking There on Track.

In *Matthews v. Philadelphia & Reading R. R.*, 161 Pa. St. 28, 28 Atl. 936, it is held that while the opening of safety gates at a highway crossing has the effect to extend to an approaching traveler an invitation to cross, yet the fact that such gates were open will not relieve from a charge of contributory negligence a person who is injured at the crossing, but who reaches the place of injury by walking along the railroad track.

A. R. Y.

LYONS et al. v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania, June 15, 1904.)

[58 Atl. Rep. 924.]

Parol Lease—Tenancy at Will.

Plaintiffs leased by parol from a brewer certain premises, they to "remain as long as they wanted," the rental to be determined by the number of barrels of beer purchased from the lessor, and to be payable "just as the beer bill was payable": *held*, that they were tenants at will, and the fact that they held over for more than a year did not create a tenancy from year to year.

Eminent Domain—Injuries to Tenant's Property—Liability of Railroad.

On condemnation of land occupied by a tenant at will, where he is given reasonable notice to remove his goods and fixtures, and fails to do so, the railroad company is not liable for injuries caused to the tenant's property by the destruction of the building.

Appeal from Court of Common Pleas, Dauphin County.

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Action by W. H. Lyons and H. H. Treon against the Philadelphia & Reading Railway Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Plaintiffs were liquor dealers, and entered into a verbal undertaking with Rieker, the terms of which were that they agreed to pay 25 cents for each barrel of beer more than the regular price elsewhere, as rental. The rental was "payable just as the beer bill was payable—paid at all times, * * * along different periods—running account; * * * sometimes every week they got a check." The understanding was that the plaintiffs "had a right to remain on that lot as long as you [they] wanted," or, as the owner's son testifies, they "could have stayed as long as they felt." The tenants erected buildings on the premises which were used for bottling, storage, liquor room, and offices, and also a stable, wagon shed, coal shed, and outbuildings and machinery necessary to the conduct of their business. The defendant company, being desirous to enter upon the lands for railroad uses, presented a bond in the usual form, which was approved May 16, 1901, and thereafter viewers were appointed for the purpose stated. The defendant gave notice to the plaintiffs December 20, 1901, that it desired possession of the lot March 1, 1902, and stated the notice was given to allow them time to arrange their affairs, but did not take actual possession of the premises until June 4, 1902. The plaintiffs disregarded the notice, and the railroad company proceeded to the demolition of the buildings. The court gave binding instructions for defendant.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and POTTER, JJ.

Casper Dull, for appellants.

John T. Brady, for appellee.

PER CURIAM. The appellants were tenants at will of Rieker. The agreement under which they went into possession was altogether indefinite as to the time it was to last. They were to "remain as long as they wanted." The rent was not fixed either as to amount or time of payment, but was determined by the number of barrels of beer they should purchase from their lessor, and was payable "just as the beer bill was payable." A clearer case of tenancy at will would be hard to discover. Under such circumstances the mere fact that the tenancy ran along for more than a year did not change its character, or convert it into a tenancy from year to year. "Where the duration of the term is left uncertain, * * * the lessee holds ab initio as a tenant at will. And the mere payment of rent will not change the tenancy into one from year to year, unless there are other circumstances to show an intention to do so; as, for instance, an agreement to pay rent by the quarter, or some other aliquot part of the year." 18 Am. & Eng. Ency. of Law

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(2d Ed.) tit. "Landlord & Tenant," p. 183. But "the mere payment of a periodical rent, however, will not necessarily have the effect of changing the tenancy at will into a periodical tenancy, and parol evidence may be admitted for the purpose of showing the character of the payment." Id. p. 186. It was on this last principle that the issues in *McDowell v. Simpson*, 3 Watts, 129, 27 Am. Dec. 338, and *Dumn v. Rothermel*, 112 Pa. 272, 3 Atl. 800, were sent to the jury to determine whether the leases were at will or from year to year. In both cases the rent was paid yearly, and the expression of Justice Kennedy, in the former, so much relied on by appellants, that, "if the tenants were suffered to hold under it for upwards of a year, paying the rent as it became due, and the plaintiff receiving it without objection, the lease, instead of continuing to be a lease strictly at will, would thereby become a lease from year to year," must be read in connection with the facts of the case. Being tenants at will, the termination of the lessor's estate, even though by involuntary alienation under eminent domain, determined the appellants' lease, and made them technically tenants at sufferance of the railroad company. The difference, however, is not practically of any importance. All they were entitled to in either case was notice, and a reasonable time to remove their goods and fixtures. This they received, but failed to avail themselves of, and the learned judge below was justified in treating their conduct as an abandonment.

The filing of the bond by the railroad company did not change the nature of the tenancy nor the rights of the appellants, except so far as it substituted the company as lessor in place of Rieker. The bond was security for such damages as the appellants "shall be entitled to receive for the entering by the said company upon the said lands and establishing and constructing the said additional tracks and structures thereon." If the company had entered immediately, and demolished the buildings in the construction of its tracks, it would have been liable just as its predecessor, Rieker, would have been, for the damages caused by want of reasonable opportunity to appellants to remove their property; but, such opportunity having been given, there were no damages, and the verdict was rightly directed for defendant.

Judgment affirmed.

LOUISIANA RY. & NAVIGATION CO. *v.* JONES.

(Supreme Court of Louisiana, June 20, 1904.)

[36 So. Rep. 877.]

Expropriation Proceedings—Damages.*

In expropriation under the eminent domain, the owner is entitled to the market value of the property taken, and to such damages as may result to the remainder of the property of which the expropriated property forms a part, and to nothing else. It is not a question of the value of the property to the owner, or its adaptability to the uses of the owner, but of its market value; taking into account, however, all the considerations that would weigh at private sale.

(Syllabus by the Court.)

Appeal from Twenty-Fourth Judicial District Court, Parish of West Feliciana; Charles Kilbourne, Judge.

Action by the Louisiana Railway & Navigation Company against H. W. Jones. From the judgment, plaintiff appeals. Modified.

Samuel McC. Lawrason, for appellant.

Joseph L. Golsan, for appellee.

PROVOSTY, J. The plaintiff railroad seeks to expropriate a right of way across defendant's property, and

*As to the measure and elements of damages recoverable in eminent domain proceedings, see *East & W. I. Ry. Co. v. Miller* (Ill.), 8 R. R. R. 692, 31 Am. & Eng. R. Cas., N. S., 692 (remote or speculative damages not recoverable); *Bailey v. Boston & P. R. Corp.* (Mass.), 7 R. R. R. 500, 30 Am. & Eng. R. Cas., N. S., 500 (loss of business connected with land not taken; and rental value of property not taken to be considered as special injury, as distinguished from that suffered by the public generally; and temporary injuries caused by construction of railroad); *Beveridge v. Lewis* (Cal.), 3 R. R. R. 83, 26 Am. & Eng. R. Cas., N. S., 83; *Illinois Cent. R. Co. v. Hoskins* (Miss.), 4 R. R. R. 469, 27 Am. & Eng. R. Cas., N. S., 469; *Lough v. Minneapolis & St. L. R. Co.* (Iowa), 2 R. R. R. 375, 25 Am. & Eng. R. Cas., N. S., 375 (measure of damages in condemnation proceedings to secure right of way); *Neff v. Pennsylvania R. Co.* (Pa.), 2 R. R. R. 843, 25 Am. & Eng. R. Cas., N. S., 843 (measure of damages for taking private way appurtenant to land); *Illinois Cent. R. Co. v. Hoskins* (Miss.), 4 R. R. R. 469, 27 Am. & Eng. R. Cas., N. S., 469 (punitive damages not recoverable against railroad in possession of land under defective condemnation proceedings); note, 3 Am. & Eng. R. Cas., N. S., 30 (for abandonment of proceedings); note, 8 Am. & Eng. R. Cas., N. S., 710 (incidental expenses rendered necessary by the taking); note, 13 Am. & Eng. R. Cas., N. S., 851 (injury to land not taken); note, 9 Am. & Eng. R. Cas., N. S., 409 (interest on damages); note, 13 Am. & Eng. R. Cas., N. S., 376 (measure of damages); note, 13 Am. & Eng. R. Cas., N. S., 408 (prospective profits); note, 16 Am. & Eng. R. Cas., N. S., 717 (special adaptability of land as element of damages); note, 13 Am. & Eng. R. Cas., N. S., 393 (where no part of premises is taken); *Mahaffey v. Beech Creek R. Co.* (Pa.), 3 Am. & Eng. R. Cas., N. S., 165; *Metropolitan West Side Elevated Ry. Co. v. Stickney* (Ill.), 3 Am. & Eng. R. Cas., N. S., 147; *Union Term. R. Co. v. Peet Bros. Mfg. Co.* (Kan.), 13 Am. & Eng. R. Cas., N. S., 851; *Galesburg & G. E. R. Co. v. Milroy* (Ill.), 19 Am. & Eng. R. Cas., N. S., 277; *Allmon v. Chicago, P. & M. R. Co.* (Ill.), 3 Am. & Eng. R. Cas., N. S., 164; *Central Trust Co. of N. Y. v.*

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appeals from a verdict allowing defendant \$50 per acre for the property, and \$845 of damages.

The damages are claimed on the theory that the land proposed to be taken is worth to defendant far more than its market value, owing to the fact that the situation of his business is such that he is compelled to live in that neighborhood, and that this is the only piece of land available to him as a site for a home. Defendant's land is a tract of 16 to 18 acres situated in the parish of West Feliciana, near Tunica Bluffs, on the east bank of the Mississippi river. It begins in the hills, and extends to the river. It is wedge-shaped, the sharp end of the wedge being towards the river. On the opposite side of the river is Raccourci Island, on which defendant has large planting interests, and also a manufactory of excelsior. These lands on Raccourci Island overflow, so that defendant cannot live on them, and he has been living on this small tract of land on the West Feliciana side of the river, as being the nearest spot available for a home. Heretofore defendant has been living on that part of the land between the river and the hills, but the high waters of 1897 and 1903 overflowed his premises; and he testifies that since 1897 he has been advised by his physician to abandon the present location of his residence, and establish himself on the higher part of the land, and that the particular part of the land proposed to be taken by plaintiff is the only level portion

Thurman (Ga.), 3 Am. & Eng. R. Cas., N. S., 164; Spring City G. L. Co. v. Penn. S. V. R. Co. (Pa.), 3 Am. & Eng. R. Cas., N. S., 164 (measure of damages to land not taken); Metropolitan W. S. El. R. Co. v. Clancy (Ill.), 3 Am. & Eng. R. Cas., N. S., 165 (measure of damages to land not taken equal to value of whole track before taking); Wellington v. Boston & M. R. Co. (Mass.), 3 Am. & Eng. R. Cas., N. S., 165 (measure of damages to land not taken, lots considered as separate parcels); Metropolitan W. S. El. R. Co. v. Clancy (Ill.), 3 Am. & Eng. R. Cas., N. S., 164 (measure of damages to land not taken, necessity of decrease in value); Metropolitan W. S. El. Ry. Co. v. Stickney (Ill.), 3 Am. & Eng. R. Cas., N. S., 147 (measure of damages to land not taken, buildings not taken); Chicago & A. R. Co. v. City of Pontiac (Ill.), 9 Am. & Eng. R. Cas., N. S., 382 (measure of damages to land not taken, speculative damages); Metropolitan West Side El. R. Co. v. Clancy (Ill.), 3 Am. & Eng. R. Cas., N. S., 164 (measure of damages to land not taken, tests as to damages); Spring City Gas Light Co. v. Pennsylvania, etc., R. Co. (Pa.), 3 Am. & Eng. R. Cas., N. S., 164 (measure of damages to land not taken, treating unoccupied land of gas company as part of plant); Foster v. Chicago, R. I. & T. Ry. Co. (Tex.), 3 Am. & Eng. R. Cas., N. S., 1 (measure of damages to land not taken where separate tracks were condemned); Chicago, B. & Q. R. Co. v. City of Naperville (Ill.), 3 Am. & Eng. R. Cas., N. S., 702 (measure of damages to land not taken where street is extended over depot grounds); Atchison & N. R. Co. v. Boerner (Neb.), 3 Am. & Eng. R. Cas., N. S., 168 (measure of depreciation in value of property because of injury to it for business purposes); Boteler v. Philadelphia & R. T. R. Co. (Pa.), 3 Am. & Eng. R. Cas., N. S., 132 (measure of damages for destruction of leasehold interests); Bellingham Bay & British Columbia R. Co. v. Strand (Wash.), 3 Am. & Eng. R. Cas., N. S., 171 (improvement by condemning company as element of damages); Los Angeles, P. & G. R. Co. v. Rumpp (Cal.), 3 Am. & Eng. R. Cas., N. S., 133 (measure of damages, instruction to ascertain compensation

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available to him as a building site, and that the other parts are so cut up that the expense of leveling anywhere a site for a home would be very great. What this expense would be, is not stated. Defendant says he has tried in vain to buy other land in the neighborhood. He says further that the land proposed to be taken by the railroad being the only level part of the high land, and the only available place for a residence, he will practically be deprived of his entire property, if deprived of this particular spot, and that the injury to him will be fully \$5,000, and he claims that amount.

We find no reason to disturb the verdict of the jury in so far as the amount allowed for the land is concerned. But the allowance for damages cannot be sustained. There is not one iota of evidence to show that the rest of the property of defendant will be damaged. Granting that defendant himself personally will be greatly inconvenienced, if, desiring to move his house from its present location to higher land, he can find no place to move to after this part shall have been taken by the railroad, and granting that this inconvenience will represent to him the full amount of \$5,000, which he names as his loss, yet he can recover no more than the market value

irrespective of damages to property not taken); *Chicago, P. & M. R. Co. v. Goff* (Ill.), 3 Am. & Eng. R. Cas., N. S., 136 (measure of damages, misleading instruction as to estimation of damages to particular tract); *Chicago, B. & O. R. Co. v. City of Chicago* (U. S.), 7 Am. & Eng. R. Cas., N. S., 26 (nominal damages); *Hamilton v. Pittsburgh, B. & L. E. R. Co.* (Pa.), 13 Am. & Eng. R. Cas., N. S., 376 (speculative profits); *Shreveport & R. R. Val. Ry. Co. v. Hinds* (La.), 13 Am. & Eng. R. Cas., N. S., 325 (value of land and necessity of keeping it distinct from damages); *Chicago, M. & St. P. Ry. Co. v. City of Milwaukee* (Wis.), 9 Am. & Eng. R. Cas., N. S., 537 (compliance with valid police regulations and changes in corporate charters are not subjects for compensation); *Morris & E. R. Co. v. City of Orange* (N. J.), 16 Am. & Eng. R. Cas., N. S., 631 (cost of gates, signboards, etc., where street is laid across railroad); *Lake Erie & W. R. Co. v. Comm'rs* (Ohio), 18 Am. & Eng. R. Cas., N. S., 765 (damages for running county ditch across right of way); *Hamilton v. Pittsburgh B. & L. E. R. Co.* (Pa.), 13 Am. & Eng. R. Cas., N. S., 376; *Kay v. Glade Creek & R. R. Co.* (W. Va.), 17 Am. & Eng. R. Cas., N. S., 695 (danger from fire); *Reiber v. Butler & P. R. Co.* (Pa.), 23 Am. & Eng. R. Cas., N. S., 421 (elements of dangers for entry and construction of road); *Chicago, R. I. & P. R. Co. v. O'Neill* (Neb.), 13 Am. & Eng. R. Cas., N. S., 371; *Galesburg & G. E. R. v. Milroy* (Ill.), 19 Am. & Eng. R. Cas., N. S., 277; *Hamilton v. Pittsburgh B. & L. E. R. Co.* (Pa.), 13 Am. & Eng. R. Cas., N. S., 376 (elements); *Union Term. R. Co. v. Peet Bros. Mfg. Co.* (Kan.), 13 Am. & Eng. R. Cas., N. S., 851 (evidence of plans for future use of land); *Chicago B. & O. R. Co. v. City of Naperville* (Ill.), 8 Am. & Eng. R. Cas., N. S., 702 (interruption to business); *Chicago & A. R. Co. v. City of Pontiac* (Ill.), 9 Am. & Eng. R. Cas., N. S., 382 (incidental expenses); *Sheldon v. Boston & A. R. Co.* (Mass.), 13 Am. & Eng. R. Cas., N. S., 390 (injury by change of roadbed to well, on land not condemned); foot-note appended to *Chicago, etc., Ry. Co. v. Vaughn* (Ill.), 10 R. R. 162, 33 Am. & Eng. R. Cas., N. S., 162 (railroad company not required to pay for improvements made by it prior to condemnation); foot-note appended to *South Bound R. R. v. Burton* (S. Car.), 10 R. R. 147, 33 Am. & Eng. R. Cas., N. S., 147 (elements of damages to private property from the construction and operation of railroads in streets).

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of the land taken, and the jury has allowed him that in full. It is a well-settled rule that in such cases the amount to be paid is determined by market value, and that "it is not a question of the value of the property to the owner." *Lewis on Eminent Domain*, p. 624. Besides, defendant has not testified that he intends to move his home from its present location to the spot in question, or that he would do so in case it was not taken by the railroad, but only that his physician has been advising him to do so since 1897. Non constat that defendant would move to this spot even if the railroad did not take it.

The judgment is reduced to \$155, and, as thus reduced, is affirmed. Costs of appeal to be paid by defendant.

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(Supreme Court of California, Sept. 1, 1904.)

[77 Pac. Rep. 1124.]

Appeal—Review.

Alleged errors in allowing defendant to file a cross-complaint cannot be reviewed in the absence of a bill of exceptions.

Same—Same.

Objections to the sufficiency of a cross-complaint, that the findings were not within the issues, and that the judgment is not supported by the findings, cannot be reviewed on appeal from an order denying a new trial.

Contract for Sale of Right of Way—Proposed Location of Railroad—Representations.

Plaintiff, who had previously had ineffectual negotiations with M. for the sale of a railroad right of way through her ranch, before the line had been surveyed, thereafter contracted, through the efforts of S., to convey to defendant a right of way where the surveyed route of the railroad as finally located should intersect the eastern boundary of plaintiff's land. During the previous negotiations M. had shown plaintiff three prospective routes through the ranch, and his negotiations were more particularly with reference to the northern route, but the conveyance presented to her by M. authorized a construction at such a point as the line should finally be surveyed: *held*, that it was not error to find contrary to plaintiff's evidence, that there was no representation made to her that the road had finally been located on the northern route, or that she intended solely to grant a right of way over such route.

Same—Inducements—Evidence—Representations.

Where plaintiff, in an action to enforce an agreement for the sale of a railroad right of way, gave no evidence as to any advantage to be derived by her from the commencement of the construction near her property line, or that any damage resulted from a commencement at the opposite end of the section, her general testimony that the railroad's representation that work would be begun at her end of the line within 90 days after the right of way was secured was one of the material inducements prompting her to execute the agreement was insufficient to require a finding that such representation was a material inducement for the contract, plaintiff having also testified that the benefits to be derived from the construction of the road did not operate on her mind in the matter.

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Same—Breach of Covenant—Delay in Construction.

Where, beside great physical obstacles, hindering the construction of a railroad, the company was also affected by the financial panic of 1893, which was unforeseen at the time a contract for a right of way was made, the fact that 2½ years were expended in building about five miles of the road, the construction of which required an expenditure of \$7,000,000 was not so unreasonable as to constitute a breach of the railroad's covenant with the vendor to construct the line with reasonable speed.

Same—Reasonableness.

Where plaintiff, when she executed a contract for the sale of a right of way through her ranch, was, and still is, the owner of three tracts, aggregating 1,100 acres, of productive land in the immediate neighborhood of the railroad, and a station was located near the eastern boundary of one of the tracts, and was of easy access from the others, and by means of the road plaintiff's market for products was greatly enlarged, the contract by which she conveyed the right of way 100 feet wide through her land for \$1 and other benefits to be derived from the construction of the road was not unreasonable.

Same—Same—Prospective Benefits.

In determining the reasonableness of a contract for the sale of a railroad right of way, prospective advantages probable in their attainment may be considered, as well as the immediate benefit to be derived by plaintiff from the construction of the road.

Appeal—Review.

Rulings of the trial court will not be reviewed on appeal where they are not discussed in appellant's brief.

Department 2. Appeal from Superior Court, Santa Barbara County; W. S. Day, Judge.

Action by Catherine M. Bell against the Southern Pacific Railroad Company. From a judgment denying plaintiff's motion for a new trial she appeals. Affirmed.

B. F. Thomas, for appellant.

Canfield & Starbuck, for respondent.

LORIGAN, J. As originally brought, this action was in ejectment to recover a tract of land in Santa Barbara county over which the railroad of the defendant is constructed and operated, and for damages for the alleged trespass committed in entering thereon, and for the value of the rents, issues, and profits. Defendant answered, denying the material allegations of the complaint, and set up, in justification of its entry, possession, and use, a written agreement on the part of the plaintiff to convey to it, as a right of way for its railroad, a part of the premises described in the complaint, and of which alone it alleged it was in possession. At the same time, by cross-complaint (subsequently amended) defendant sought to have this agreement to convey specifically enforced, and upon the issues made by an answer of plaintiff thereto, denying, among other things, the identity of the land occupied by defendant with that mentioned in the agreement, accompanied by allegations of false representations inducing its execution, inadequacy of consideration, unreasonableness of its terms, failure to perform conditions precedent, and a plea of the statute of limitations, the court proceeded to try this equitable phase of the litigation, made

findings in favor of the defendant and against plaintiff on all the issues, and awarded a decree to defendant for the affirmative relief prayed for, and directing the plaintiff to execute and deliver to defendant a deed to the premises described in its cross-complaint. From the judgment entered against her, and from an order denying her motion for a new trial, she takes this appeal.

Under the appeal from the judgment plaintiff attacks the sufficiency of the cross-complaint as stating a cause of action; likewise the validity of an order permitting it to be refiled; and insists, also, that certain of the findings are outside the issues, and that the judgment is not supported by the findings. As the record now stands, however, plaintiff cannot avail herself of these particular objections. The appeal from the judgment in this case was, on July 22, 1902, dismissed by order of this court (*Bell v. S. P. R. R. Co.*, 137 Cal. 77, 69 Pac. 692), leaving nothing for consideration on this appeal but the validity of the order denying the motion for a new trial, which motion was based upon errors of law and insufficiency of the evidence. As to the alleged error in allowing the cross-complaint to be filed, if any exception was taken to this by the plaintiff, there is no bill of exceptions in the record saving and presenting the point. As to the other objections, they cannot be presented or considered on an appeal from the order denying a new trial. If they existed, they could only be ascertained from the face of the judgment roll, and could only be availed of by an appeal from the judgment itself. As that appeal was dismissed, there is no record before us to support those objections. *Thompson v. City of Los Angeles*, 125 Cal. 270, 57 Pac. 1015; *Reclamation District v. Thisby*, 131 Cal. 572, 63 Pac. 918; *Moore v. Douglas*, 132 Cal. 400, 64 Pac. 705; *Morse v. Wilson*, 138 Cal. 559, 71 Pac. 801; *Swift v. Occidental M. & P. Co.*, 141 Cal. 165, 74 Pac. 700; and many other cases.

This brings us to a consideration of the appeal from the order denying plaintiff's motion for a new trial, which was based upon alleged erroneous rulings of the court in the admission and rejection of testimony, and the asserted insufficiency of the evidence to sustain certain findings. The agreement set forth in the cross-complaint, and which the court decreed should be specifically performed, is conceded to have been made by the plaintiff with the defendant, and, as far as the purposes of this case are concerned, its important recitals are: "That I, Catherine M. Den Bell, * * * in consideration of the benefits to be derived by me in the construction of the Southern Pacific Railroad Company's railroad, and of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, do hereby grant and agree to and with the Southern Pacific Railroad Company, upon the payment to me or my legal representatives of the sum of one dollar, to sell and convey to said company all that certain piece or par-

cel of land, situated in the county of Santa Barbara, state of California, and the conveyance shall contain the following conditions: [Here follow a number of recitals that are not material to any point involved in the case] and being a portion of the Dos Pueblos Rancho bounded on the east by lands of Ellwood Cooper, and on the west by lands of the Tecolote Land and Water Company and more particularly described as follows, to wit: Commencing for the same at a point on the center line of the surveyed route of the Southern Pacific Railroad where the line of the same as finally located may or shall intersect the eastern boundary line of said party of the first part and running thence in a westerly direction along said center line and embracing a strip of land fifty (50) feet wide on each side of said center line, to the western boundary of the land of the party of the first part and the eastern boundary of the lands of the Tecolote Land and Water Company together with all the appurtenances belonging. And the engineers, agents, employees and contractors of said company are hereby authorized to enter upon said land for the purposes of the survey and construction of said railroad. In case said railway shall not be located on said land, this agreement shall be null and void." This agreement was one of many obtained for the defendant in the counties of San Luis Obispo and Santa Barbara in order to provide a continuous right of way for the completion of its coast line by filling the gap intervening between Santa Margarita, in San Luis Obispo county, and Ellwood, in Santa Barbara county. Construction between these two points had ceased in the early part of 1899, and nothing was done towards its resumption until some two years later, when committees of prominent citizens of San Luis Obispo and Santa Barbara counties, anxious for the completion of the road between these terminal points, solicited and obtained from the principal stockholders of the defendant a written agreement that the road would be completed between these points after such committees had furnished the defendant with the necessary continuous right of way for that purpose. As far as a particular right of way from the plaintiff is concerned, one H. D. La Motte, the agent of the defendant, theretofore acting for it, in procuring rights of way between these points had some time prior to the cessation of construction endeavored to obtain a deed therefor from her, but, some disagreement arising between them about the consideration for the conveyance, the effort was abandoned. Nothing further was done with that end in view until the Santa Barbara committee, under its agreement with the stockholders of defendant, took up the matter, and on September 20, 1890, procured from plaintiff the agreement above referred to. This was secured through the efforts of one Dr. Shaw, a friend of the plaintiff, who visited her for that purpose with one of the members of such committee, and it was obtained by him at

the solicitation and on behalf of the committee. The last agreement necessary to insure a continuous right of way between Santa Margarita and Ellwood was secured for the defendant November 28, 1891, and on December 6, 1891, the work of construction between these points was resumed by it. Claiming to act under this agreement given by the plaintiff, a right of way over her land was staked upon the ground in July, 1895, and in March, 1899, defendant entered upon the premises and constructed its railroad thereover. The construction of the entire road between the main terminal points above designated was completed in December, 1900, and operation thereover was commenced in March, 1901. Aside from this reference to the general facts in the case, we will, as we proceed, refer to other facts, either admitted, established by the evidence, or disputed, as occasion requires us to bring under review the particular findings which have been challenged.

In her answer to the cross-complaint plaintiff averred that when she executed the agreement above set forth it was represented to her by the defendant that the route of its road had then been permanently and finally located and surveyed and staked out about half a mile north of the route on which defendant ultimately constructed its road over her land; that she believed, and that defendant knew she believed, this representation; that she believed that such instrument granted a right of way over said northern route, as was represented to her as having been finally located, and not otherwise, and that it was her intention to grant defendant a right of way for its road over said northern route, and not over the route where defendant had actually constructed its road, and for which it sought to enforce a conveyance from plaintiff; that it was further represented to her at the time of the execution of said agreement that the defendant's railroad would be immediately extended from Ellwood, situated about one-half a mile easterly from the eastern boundary of her land, and that the construction thereof would continue without cessation until it should reach Templeton, in San Luis Obispo county; that such representation, she avers, was one of the inducements and consideration for the execution of the agreement, without which it would never have been made; and that such representation was falsely and fraudulently made and was not complied with. The court specifically found against her on all these matters, and she attacks the findings in these particulars was not sustained by the evidence. Addressing ourselves first as to the matter of the representation claimed to have been made to plaintiff concerning the location of the right of way at the time when Dr. Shaw obtained the agreement from her, and her belief that said agreement referred to said northern route, the only definite evidence we have on this matter is the evidence of the plaintiff herself. She testified that when Dr. Shaw, who

purported to represent the citizens' committee, called upon her (Dr. Shaw, we gather from the remarks of counsel for plaintiff, was dead when the case was tried), he stated that he wanted an agreement from her for the same right of way that Mr. La Motte had wanted. This is all that is claimed to have been said upon the subject by Dr. Shaw or any one else, and is the sole representation upon which she claims she executed the agreement, believing that it conveyed a right of way according to a northern survey over her lands, and which she insists was the right of way concerning which she and La Motte had ineffectual negotiations. There is no evidence to support the other claim in her answer that it was also represented to her that this northern route had been permanently and finally surveyed, located, and staked out as the route through her lands upon which the railroad was to be constructed. Now, while it is true that the right of way for which La Motte wanted a deed embraced more particularly the northern route, as claimed by her, still the map which he presented to her when negotiating for a right of way showed two other surveyed lines running through her tract, and the conveyance itself presented for signature, which she either read or La Motte read to her, provided generally as to a right of way: "That if the party of the second part shall, before the construction of its road, deem it advisable to change the line of its road as now surveyed, where it passes through the land of the party of the first part, that it may do so, and in that event this conveyance shall by the parties heretofore be reformed so as to include land fifty feet in width on each side of the center of said road as constructed." In their negotiations there was no objection to this latter clause, or to any of the terms of the conveyance. The disagreement which terminated negotiations concerning it was relative solely to the compensation for its execution. There is no claim that the terms of the conveyance presented for execution by La Motte did not correctly represent the rights which the defendant desired to acquire, or a particular or general right of way over the lands of plaintiff, or that the plaintiff did not know and understand that those rights were what La Motte desired to obtain from her for the defendant. It will be observed that the location of defendant's road over the northern survey through plaintiff's land was, by the very terms of the instrument itself, not intended to be definite, fixed, or permanent, otherwise than as the defendant might subsequently elect to make it so. It was considered merely as the probable line over which the road would be built, subject, however, to change at the will of defendant under the clause in the conveyance expressly providing for such change, and the construction of the road over the plaintiff's land on any other route the defendant might deem advisable to select, with the right, when such selection was made, to have the conveyance

reformed so as to grant a right of way over the route finally selected. There is no evidence in the case that either in the negotiations through La Motte or subsequently through Dr. Shaw there was any statement or declaration made that the route of defendant's road had been finally and permanently located on the northern survey. The conveyance which La Motte wanted and which she read did not so state. In fact, from its terms it was clear that it was not so considered. In their terms there was no essential difference as to the right of way La Motte wanted and the right of way provided for under the agreement obtained by Dr. Shaw. The former was, in effect, for a right of way across plaintiff's land on the northern survey, or anywhere else the defendant might deem advisable to construct its road, and the latter provided for a conveyance or right of way over her lands wherever the route was finally located by the defendant. Both amounted to practically the same thing, and negative the idea that any final location of a route had been determined on or discussed at any of these interviews. The agreement obtained by Dr. Shaw, which plaintiff admits she read, and which she does not pretend she did not understand, expressly referred to the future, and provided for a right of way as to the line upon which the defendant's road, as finally located, may or shall intersect plaintiff's eastern boundary. There is no call for past surveys or lines which already intersect the boundary, but only for such as in the future are finally established and may do so. The court found upon sufficient evidence that the line of the surveyed route of the railroad was not finally located over plaintiff's land till the 12th and 13th of July, 1895, and it was then located on a line different from the line of the north survey, and upon the one relative to which the grant of a right of way was specifically decreed in this action. So that, taking into consideration all these matters, there does not seem any basis for the contention of plaintiff that the evidence did not justify the finding that there was no representation made to her, when she signed the agreement in question, that the line of defendant's road had been finally located on the northern survey, or that she so believed, or intended solely to provide for granting a right of way over said route. As we have said, there is no evidence of any representation that the northern route had been surveyed as the final and permanent location of the line. And the court was not bound to accept her statement of her belief that it was so located, or that she intended only to agree to a right of way along it, when there is no substantial evidence to warrant the existence of such a belief or disclosing such an intention, and when the prior negotiations with La Motte show that no permanent, fixed, or unchangeable line for a right of way was negotiated for by him, and when the agreement in dispute expressly calls for a right of way to be determined by future final location.

As to the finding against the averment in her answer of a representation concerning the immediate resumption of the construction of defendant's road near her land, and its diligent prosecution to completion at Templeton, and the materiality of such representation as an inducement and consideration for the execution of the agreement, which she avers would not have been executed had this representation not been made. As to the representation, she testified that Dr. Shaw said, when interviewing her to obtain the agreement, "that the railroad had promised to resume work 90 days after they had secured the right of way from the different property owners, and, as the work was to be commenced at my place, it was important to secure mine among the first." This was the only testimony as to the representation itself, or its operation as influencing plaintiff's execution of the agreement, and it is insisted that the court had no right to disregard this testimony and find to the contrary. But the gist of the matter is not so much whether such representation was made, but whether it was a material inducement and consideration, and operated as such in the execution of the agreement by the plaintiff. An agreement in writing, which is complete and definite in its terms, cannot be successfully attacked and defeated under a claim that a contemporaneous oral representation subsequently fulfilled, operated as a material inducement and consideration for its execution, unless such claim is sustained by clear, cogent, and convincing evidence; and whether, in any case, the evidence is of such a persuasive character, is for the determination of the trial court. As a matter of fact, the work of construction was resumed within eight days after a complete right of way was obtained from "the different property owners," but the resumption commenced at Santa Margarita, and not near the line of plaintiff. So, that the burden of her complaint is that it commenced at one end of the line rather than at the other. While she testified generally on the trial that this representation was one of the material inducements prompting the execution of the agreement, she gave no reason nor made any suggestions in what respect it was material, or what difference it made to her that the work should have been begun at one end of the line rather than at the other; nothing to indicate that she had in view any advantage to be derived by her from the commencement of construction near her property line, or that any damage resulted from failure to do so; nor was any reason assigned why, if she deemed this representation controlling, she did not have it inserted in the agreement; and it might be suggested also, in the absence of anything to the contrary, that, as a long time would necessarily elapse before the road could be completed and operated, it was to her advantage to have the work commenced at Santa Margarita, as it would leave her land longer in her undisturbed control and use. However, the court was

warranted, from her own testimony previously given, in finding that the representation was neither considered by her important nor material, and that it did not operate to secure or influence her execution of the agreement. In giving that testimony she said that she executed the agreement "in compliment to the gentlemen of the committee and in good will to the citizens at large," and that "the benefits which were to be derived from the construction of the road hardly operated in mind at all in this matter." Certainly, if benefits from the construction of the road itself did not influence her in making the agreement, it cannot be readily perceived how merely commencing the construction at any given point could have been deemed by her of material advantage. And as there was at least a substantial conflict in her testimony—the only testimony on the point—upon the matter of the materiality of any benefits which she was to derive from the execution of this agreement, as far as the construction of the road is concerned, the lower court had the right, in connection with the other evidence, or reasonable inferences to be deduced therefrom, or independent thereof, to give credence in the conflict to that portion of her testimony which, in its judgment, negatived the claim that such representation, if it was made, materially or at all influenced her execution of the agreement; and, having done so, under familiar principles of law this court cannot interfere with the conclusion of the lower court in the matter.

The next finding challenged by plaintiff as not supported by the evidence is a finding that defendant employed reasonable speed in constructing its road and completed it within a reasonable time. The objection of plaintiff in this regard is addressed solely to the prosecution of the work between Surf and La Honda, a matter of some five miles, in effecting which $2\frac{1}{2}$ years were expended. Aside from the fact that the agreement between the defendant and the citizens' committees in the respective counties made the former the sole judge of the progress and speed to be employed in construction, the evidence shows that there was never any cessation of work between these points, and that the physical difficulties in constructing this portion of the road were very great, and necessarily retarded progress. Besides physical obstacles, there was also the financial panic of 1893, prevalent throughout the country, creating a general financial stringency, which affected the progress of all great enterprises, and made it difficult for the defendant to properly realize upon the securities which were issued to provide money for the construction of this division of the road, the ultimate completion of which involved an expenditure of at least \$7,000,000. And it was this unforeseen condition of things which, in the main, was the reason why more rapid progress was not made. This stringency lasted several years, during which the building of the road between these points

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did not proceed with as much energy as would have been employed had the financial condition of the country been different. After the panic was over, and confidence restored, and the projection of large enterprises again found ready financial assistance, the work of construction was energetically pushed to completion by the defendant.

It was not claimed by plaintiff, either by averment or proof, that any more vigorous prosecution of the work would have been of any advantage to her, or that she suffered any damage by failure of earlier completion, but insists that the financial condition referred to afforded no excuse to more rapid progress by defendant; that the difficulty in obtaining the vast sums necessary was a matter personal to the defendant, and should not have had any weight in determining whether reasonable progress was made or not. But it was not such a personal matter. The enterprise of defendant was not alone affected. The financial depression was general, and affected all large enterprises. It was a condition which did not prevail when the construction of the road was projected and work actually begun. It was an occurrence which could not readily have been foreseen, contemplated, or provided against, and created a condition which, while temporary, had to be overcome before more rapid progress could be made. Whether the construction of a railroad has been prosecuted with reasonable dispatch is to be determined by the trial court largely from the character and magnitude of the enterprise involved, the difficulties and obstacles to be overcome, and the circumstances surrounding and attending the work. And in determining that matter we are satisfied that the trial court had the right to take into consideration the general financial depression prevailing, which affected all enterprises, and retarded them, in determining whether reasonable progress had been made. It is apparent that an enterprise involving, as this did, the expenditure of \$7,000,000 between Santa Margarita and Ellwood, and which embraced within these points the section between Surf and La Honda, could not be prosecuted with the same degree of speed in a time of general financial depression as in a period of general financial prosperity; and a general financial panic, which temporarily makes it difficult to obtain the large sums of money which are necessary to rapidly push an enterprise to completion, and which otherwise could be easily provided, and in fact were after the panic was over, is as much in the nature of an obstacle to be overcome as the natural obstacles which the topography of the country may interpose.

It is also insisted that the evidence does not support the findings that the agreement was, as to plaintiff, just and reasonable, or that her lands had been benefited by the construction of the road. These matters may be briefly treated of together. There is nothing upon the face of the contract to suggest any unreasonableness. We have recited its essen-

tial terms. All the conditions which were to be performed by defendant (some of which we have omitted to specify as there was no question about them) have been complied with. The road has been constructed, and is in operation, and the "benefits to be derived in the construction," etc., which she recited in the agreement as a consideration for its execution by her, have in a large measure been attained. It appears that the plaintiff, when the agreement was executed, was, and still is, the owner of three tracts, aggregating 1,100 acres, of productive land, in the immediate neighborhood of the railroad as constructed and operated; that a station has been located near the easterly boundary of one of said tracts, and of easy access from the others; that by means of said road direct, rapid, and frequent communication and transportation by rail for both passengers and freight are now had with the principal cities in the state—Los Angeles on the south and San Francisco on the north—and that the market for the products of her lands have been improved and enlarged. While the evidence is in conflict as to whether any immediate benefit has occurred to the plaintiff's land by the construction of the road, there is ample evidence that the prospective benefits are large. Counsel for plaintiff insists that such benefits are not to be considered. We do not perceive why not. Prospective advantages are none the less benefits because they are prospective; and the probability of their attainment always enters largely as an inducing cause into the execution of such agreements as the one we have been considering here. In *Spires v. Urbahn*, 124 Cal. 111, 56 Pac. 794, this court, speaking with reference to them, says: "These contracts have become familiar as stimulants to the construction of railroads and other public works; the inducement to the promisor, whether expressed or presumed, being the probable enhancement of the value of property by construction. That such contracts or mere offers, unilateral at first, may be enforced when mutuality is secured by an executed consideration, is sustained upon well-recognized principles. The consideration takes its strongest form when it is executed."

Objections in this same line of insufficiency of the evidence to support them are raised against a few other findings, but we do not think they are of sufficient merit or importance to warrant particular reference or discussion.

Plaintiff has also assigned a number of errors of law claimed to have been committed by the lower court in its rulings during the progress of the trial, but as these are not discussed in plaintiff's brief, or any reason advanced therein why any of these rulings were erroneous, we cannot undertake the task of discovering them, and must assume that no reasons are assigned why these rulings were deemed erroneous because none exist. "If a party complains of error, and seeks reversal, it is due to us that he should show wherein the error

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consists." *Brown v. Tolles*, 7 Cal. 399; *Taylor v. Bell*, 128 Cal. 308, 60 Pac. 853.

The order denying plaintiff's motion for a new trial is affirmed.

We concur: *McFARLAND, J.*; *HENSHAW, J.*

CHICAGO, B. & Q. R. CO. et al. v. CASS COUNTY et al.

(Supreme Court of Nebraska, Oct. 20, 1904.)

[101 N. W. Rep. 11.]

Res Judicata.

"A 'right, question, or fact' distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and this even though the second suit is for a different cause of action." *State v. Broatch* (Neb.) 94 N. W. 1016.

Taxation—Same Cause of Action.

A claim for taxes under the assessment for one year is not the same cause of action as a claim for taxes on the same property under an assessment for a prior year.

Same—Res Judicata.

If the liability of property to taxation depends upon the existence of a specific fact, and that fact is necessarily determined in one litigation, it cannot be controverted by the same parties in a subsequent litigation.

Same—"Part of Continuous Line of Road"—Railroad Bridges—Res Judicata—Estoppel.

The west half of the railroad bridge over the Missouri river owned by the company which operates through passenger and freight trains continuously through different counties of this state to and over said bridge, and thence through adjoining states, is "a part of the continuous line of road" with the meaning of sections 39 and 40 of the revenue act in force in 1901 (Comp. St. 1899, p. 954, c. 77, art. 1), and is assessable for taxation by the State Board, and not by local assessors, and a prior adjudication that such bridge so used is not "part of the continuous line of road" is not an adjudication of fact, and will not operate as an estoppel against the parties to such prior litigation.

Same—Same—Question of Law—Estoppel.

The question whether such bridge so owned and used is "part of the continuous line of road," within the meaning of said statute, is a question of law, and not a question of fact upon which an estoppel can be predicated.

(Syllabus by the Court.)

Appeal from District Court, Cass County; *Jessen, Judge.*

Action by the Chicago, Burlington & Quincy Railroad Company and others against the county of Cass and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

J. W. Deweese, Byron Clark, and Frank E. Bishop, for appellants.

Jesse L. Root, for appellees.

C. C. Wright and W. H. Herdman, amici curiæ.

SEDGWICK, J. The principal questions involved in this case are identical with those stated and discussed in *Chicago*,

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B. & Q. R. Co. v. Richardson County (Neb.) 100 N. W. 950, which follows and approves Chicago, B. & Q. R. Co. v. Richardson County, 61 Neb. 519, 85 N. W. 533, and also in State ex rel. Morton v. Back (Neb.) 100 N. W. 952.

There is another question presented in this case which has been thoroughly discussed in the briefs and in the oral argument upon the rehearing. The bridge in question in this case was assessed by the local officers for taxation for the years 1881 to 1885, inclusive, and in the year 1886 the railroad company, having paid those taxes under protest, brought an action in the district court of Cass county to recover the amounts so paid. Afterwards that action was brought to this court, and was determined against the company. Cass County v. Chicago, B. & Q. R. Co., 25 Neb. 348, 41 N. W. 246, 2 L. R. A. 188. It is contended that by the judgment in that case the questions involved in the case at bar are res judicata. The local authorities assessed this bridge for taxation for the year 1901, and the company brought this action to restrain the collection of the taxes. The district court enjoined the collection of the taxes as prayed, and the case was brought to this court by appeal. The subject-matter of the former litigation was the taxes assessed against this property for the respective years therein named, and the subject-matter here is the taxes assessed for the year 1901, so that it cannot be said that the two cases involve the same subject-matter, and, strictly speaking, the judgment in the one case could not have been res judicata of the subject-matter involved in the other. State v. Savage, 64 Neb. 684, 703, 90 N. W. 898; State v. Broatch (Neb.) 94 N. W. 1016.

The real question in dispute between the parties is whether in the former action the rights of the parties and questions of fact then in dispute between them have by that case been adjudicated so as to estop the parties to that litigation from now questioning the facts so determined. It was said by this court in State ex rel. Kennedy et al. v. Broatch (Neb.) 94 N. W. 1016: "A judgment, rendered by a court of competent jurisdiction, determining the rights of the litigants on a cause of action or defense, is an effectual bar against future litigation over the same right determined by such judgment, and is for all time, unless reversed or modified, binding on the parties and their privies in estate or in law. A 'right, question, or fact' distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and this even though the second suit is for a different cause of action." Of course, the propositions of law that were advanced by the court as requiring the disposition made of the issues in the former case, if afterwards found to be erroneous, would not be binding upon the court in subsequent litigation between the par-

ties involving a different cause of action. *State v. Savage*, supra; *State v. Broatch*, supra.

Many authorities are cited and ably discussed in the respective briefs of counsel. Our labors have been much lightened by those discussions and by the oral arguments at the bar. There is substantially no difference of opinion upon the controlling legal principle involved. Specific facts that are so involved in a litigation that the result of the litigation depends upon the determination of these facts are necessarily settled by that litigation, and the authorities substantially agree that such facts so determined cannot afterwards be controverted by the parties to the former litigation. To determine, then, the question before us, it is necessary to ascertain what facts controlling the rights of the parties in the former case were adjudicated, and how far those facts so ascertained are involved in and necessarily control the decision in this case. The petition in that action alleged that the plaintiff "owns the line of railroad extending from Pacific Junction, in Mills county, Iowa, westwardly across the Missouri river, and through the counties of Cass, Lancaster, and other counties farther west in the state of Nebraska; and that it has owned and operated said line of railroad since the 1st day of January, 1880; and that said line of road and property thus owned by the plaintiff is situated in more than one county in the state of Nebraska." The answer alleged "that the said railroad bridge, which spans the Missouri river at Plattsmouth, Nebraska, is a separate and independent structure from the 'roadbed and right of way' of said railroad company"; and further allege "that said railroad bridge has never been operated and controlled by said plaintiff, either in the states of Iowa or Nebraska, as a continuous part of its roadbed and main track; on the contrary, defendant avers and charges that said bridge has been maintained and operated by said corporation plaintiffs always since its construction as a separate and independent structure from its main line." In the brief for the county in the case at bar it is said: "The real controversy between the railway company and the county of Cass is the right of the local officers to assess and tax the west half of the bridge across the Missouri river near Plattsmouth, in said county;" and again, "We now ask this court to say whether, in the district court in said cause, the issue of fact, as well as of law, was not raised, litigated, and determined." It is insisted that after the former case had been brought to this court, and the judgment of the lower court therein reversed and the cause remanded, the case was dismissed and no final judgment entered in the lower court, and that therefore the issues therein presented were not finally adjudicated. If our attention had been called to a showing in this record that the plaintiffs had been allowed by the court to dismiss their former proceedings without prejudice to a future action, we

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would feel it incumbent upon us to discuss the effect of such dismissal. As it is, we think the question before us is fairly stated by counsel for the county in the foregoing quotation from the brief. It was said in the opinion of the court in the former case that it was alleged in the petition that the taxes "were unlawfully levied and collected, for the reason that the bridge was at all times a part of the line of railroad of defendant in error, and legally taxable only as the other portions of the road were taxable, and that the same was for each year reported to the State Board of Equalization as a part of the railroad, and taxed accordingly, all of which taxes had been paid"; and that the answer consisted mainly of specific denials of the allegations of the petition, and "alleged that the bridge was not legally taxable by the State Board of Equalization, that it was not a part of the roadbed of defendant in error's road, that it was not operated as a part of said road, that it was listed to the precinct assessor for taxation by the duly authorized officers of the railroad company, and that it was legally subject to taxation by the county." The language might indicate that the writer of the opinion considered that the general question whether the bridge was "a part of the line of said road" was the ultimate fact to be determined, and was a simple question of fact upon which the decision in controversy depended; but, in construing this language of the learned author of that opinion, it must be borne in mind that he was not discussing a question of *res judicata*. It was not necessary for him to discuss the question whether the result of the litigation depended upon the determination of disputed questions of fact, or depended upon the application of legal principles to conceded facts.

Although a claim for taxes under the assessment for one year is not adjudicated by a prior adjudication of the validity of a tax upon the same property under assessment for a different year, still, if the liability to taxation depends upon a charter right of exemption, the adjudication of that charter right in one litigation will estop the parties thereto to question that exemption in subsequent litigation. This was distinctly held in *City of New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202. This is a case much relied upon by the appellant in the case at bar. The thing in litigation upon which the right to collect the tax in that case depended was the contractual exemption of the bank under its charter, and, it having been determined in the prior litigation that such contractual relation existed, it was held that the parties were estopped to deny it, in subsequent litigation. The adjudication of a contract right is an adjudication of fact, and a judgment that necessarily involves the question of the existence of a charter or contract right will be binding upon the same parties in future litigation involving the existence of that right. The existence of such

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contract right was held to be the thing adjudicated in the former litigation. The court said: "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies." Some of the leading cases are then reviewed to illustrate this rule. The court said: "In *Tioga R. Co. v. Blossburg, etc., R. Co.*, 20 Wall. 137, 22 L. Ed. 331, and *Lumber Co. v. Buchtel*, 101 U. S. 638, 25 L. Ed. 1072, it was held that, when the proper construction of a contract was in controversy, the construction adjudged by the court would bind the parties in all future disputes." When the court construes a contract and determines the fact that the contract exists with the construction given it, and the rights of the parties are made to depend upon the existence of such contract, the parties are estopped in future litigation to deny its existence.

In *Chicago, B. & Q. R. R. Co. v. Richardson County*, supra, it is made plain that the court was construing the statute and merely applying its provisions to conceded facts. The court said: "It is conceded by defendants that the bridge over the Missouri river at Rulo, on the west half of which the taxes in dispute were levied, is owned and used by plaintiff as a part of its continuous line of track," and, after quoting at large sections 39 and 40 of the statute (Comp. St. 1899, p. 954, c. 77, art. 1), it was further said: "It needs no argument to show that the railroad bridge at Rulo is neither a machine shop, a general office building, or a storehouse; and if this bridge, within the meaning of the statute, is neither real nor personal property outside the right of way of plaintiff, it is not to be assessed by the local assessor, but is taxable only by the State Board of Equalization. There is no claim that it is exempt from taxation, the only controversy being as to the jurisdiction of the taxing powers. If it is inside, i. e., a part of, the right of way, as the term is employed in the act, then it must be assessed by the State Board; otherwise not. The meaning of the term 'right of way,' as employed by the statute, is important, indeed, decisive of the question." This fact is made the basis of the decision. Manifestly all other matters discussed in the opinion are legal questions, and relate to the construction of sections 39 and 40 of the revenue law. Clearly this does not make the determination of the question depend upon any disputed fact. It is held that the fact which is here recited is, "if the bridge is inside the right of way, as the term is employed in the act," then it must be assessed by the State Board. It is in that case, and in the two later cases above referred to, determined as matter of law that the proper con-

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struction of the sections of the statute under consideration is that a bridge which is used by a railroad company as a part of its continuous line of track is assessable by the State Board, and not by local assessors. The determination of these cases was made to depend upon the existence of this fact alone. It is manifest that this fact was not contested in the prior litigation relied upon as an estoppel in this case. The pleadings in that case will not admit of the construction that an issue was tendered as to whether the property of the railroad company was situated in more than one county, or as to whether the railroad company owned the bridge in question, or as to whether it used the bridge as a part of its continuous line of track, or as to whether the bridge was inside the right of way within the meaning of the statute as it is now construed. The question contested was whether these facts brought the case within the provision of section 39, and it was erroneously determined that they did not. The court, in determining whether the conceded ultimate facts constituted the bridge in question a part of the continuous line of road within the meaning of the statute, said that it was shown that much higher rates were charged for the transportation of passengers and freight across the bridge than over any portion of defendant's road, and that while, in fact, so far as the running of trains and transportation of passengers was concerned, no change or transfer was made, yet additional burden was placed upon all for crossing the bridge. It was said: "To that extent, at least, the road was not operated as a continuous line." Other facts are mentioned in the opinion as tending to show that the road was not operated as a continuous line. Upon consideration of all these facts, none of which were in dispute, it was concluded that the road was not operated as a continuous line within the meaning of the law. This construction of the law has been found to be erroneous, and it is by the later decisions declared to be the law of this state that the facts which have always been conceded to exist constitute the bridge a part of the continuous line of road within the meaning of the statute. The facts, then, to which the construction of the statute is applied are not in controversy in this case, and have never been controverted, but always conceded or assumed in all the similar litigation. It follows that neither party is estopped to assert these essential facts. The other questions presented by the record are sufficiently discussed in the opinions above referred to.

The judgment of the district court is affirmed.

GRAND RAPIDS & I. RY. CO. v. CITY OF GRAND RAPIDS et al.

(Supreme Court of Michigan, Oct. 4, 1904.)

[100 N. W. Rep. 1012.]

Taxation—Exemptions—Use for Railroad Purposes.

Comp. Laws 1897, § 6277, provides that specific railroad taxes shall be in lieu of all other taxes on the properties of such companies, except such real estate as is owned and can be conveyed by such corporations under the laws of the state, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road: *held* that, where a parcel of land owned by a railroad was occupied by certain side tracks and a coal dock belonging to the road, and the spaces between such tracks were occasionally and necessarily used for the storage of bulky articles, such tract was "actually used for railroad purposes," and was therefore exempt from taxation.

Same—Same—Same.

Other land owned by the railroad, but in possession of private individuals, and used exclusively by them in their individual business for wood and coal yards and sheds and storage of grain, etc., was neither "actually occupied" by the railroad nor "necessary or in use in the proper operation" of the road within such statute, and was therefore properly taxable as other real estate.

Grant and Hooker, JJ., dissenting in part.

Appeal from Superior Court of Grand Rapids, in Chancery; Richard L. Newnham, Judge.

Suit by the Grand Rapids & Indiana Railway Company against the city of Grand Rapids and another. From a judgment in favor of defendants, plaintiff appeals. Modified.

T. J. O'Brien and James H. Campbell, for appellant.
Moses Taggart, for appellees.

CARPENTER, J. The object of this suit is to enjoin the sale of ten parcels of land for the nonpayment of taxes assessed thereon by the city in 1901. The trial court gave complainant relief as to parcels 8 and 9, but held it liable to pay either all or part of the taxes assessed against the other parcels. Complainant paid the taxes on parcels 4 and 6, and asks this court on this appeal to decree that it is not liable to pay taxes on the other parcels. The principal ground upon which complainant seeks relief is that the parcels of land in question are by law exempt from taxation.

The larger part of parcels 1, 2, 3, 5, and 7 were, by the consent of complainant, in 1901, in the exclusive possession of private individuals, who used the same for their own business. Two wood and coal yards were located on parcel 2, one on parcel 1, one on parcel 7. A wood yard was located on parcel 3, a lumber yard on parcel 5. The business carried on at these yards by these various private individuals was apparently precisely what it would have been had their location been remote from the railroad. Most, if not all, of the merchandise bought by them came to them by rail over complainant's railroad. Some of that sold by them—though in

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the case of the wood and coal this appears to have been very little—were shipped away over complainant's railroad. But apparently they sold, and had a right to sell, merchandise to any one who would buy. The estates of these private individuals granted by the railroad company were not in form permanent. The record does not show what rights the owner of the wood yard on parcel 3 had. Complainant gave no express permission for the occupancy of parcel 5 for a lumber yard. But we are bound to decide that that permission was implied. The occupation of parcels 1, 2, and 3 for coal and wood yards was under an express agreement called a "permission and license." The record contains the agreements by which parcels 2 and 7 are occupied. The occupant was to pay no rent; to remove the buildings by him erected, and to vacate the property, in one case in 60 and in the other in 30 days after notice. The occupants of parcels 2 agreed to pay the taxes on the property, if any were assessed. On parcel 1 there was also situated an elevator owned and controlled by the Brown Milling Company. This building was erected under a written permission made in 1888, similar to the writing above described, except that there was no provision for the payment of rent. The writing specifies that the building "shall be used for the purpose of a grain elevator and warehouse." There is no provision in the writing that the business of a public warehouseman shall be carried on, and there is nothing to indicate that the business that was actually carried on was in any sense a public business. On the contrary, it is to be inferred that the occupant used the same exclusively for storing and shipping the grain purchased or shipped in by itself.

Though the estate of these occupants is called a license, it was, in a legal sense, more than a license. See *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 119. It had many of the characteristics of an estate at will. See *Washburn on Real Property* (6th Ed.) §§ 762-796. While it was terminable at will, it might last for a long period, and as a matter of fact at the time the assessment was made parcel 7 had been occupied under the agreement above described for 19 years. Parcel 10 was in the form of a parallelogram, 800 feet in length north and south, and 350 to 400 feet in width east and west. A short distance from its eastern boundary was a side track. On the western 85 feet of the track were four side tracks and a coal dock belonging to defendant. About midway between the tracks on the western side and the side track on the eastern side was another track—a stub track—which extended south about 100 feet from the northern line of this tract. All these side tracks were used by defendant as occasion demanded. While it is evident that when the assessor placed this tract upon the assessment roll he found vacant, we are nevertheless satisfied from the testimony of complainant that the spaces between these various tracks

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were occasionally used, and necessarily used, for the storage of bulky articles; e. g., railroad material of various kinds and sewer pipe. This does not mean that every foot of space on this tract was actually used for storage purposes. The space was used for that purpose as occasion demanded, and we are bound to say that such use was occasionally demanded. Was this property subject to taxation like other real estate? This depends upon the proper construction of the following part of section 6277 of the Compiled Laws of 1897: "The taxes so paid [the specific tax] shall be in lieu of all other taxes upon the properties of such companies, except such real estate as is owned and can be conveyed by such corporations under the laws of this state, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road, but such real estate so accepted [obviously this should be "excepted"] shall be liable to taxation in the same manner, and for the same purposes, and to the same extent, and subject to the same conditions and limitations as to the collection and return of taxes thereon, as is other real estate in the several townships or municipalities within which the same may be situated." I agree with my Brothers Grant and Hooker that under this section parcel 10 is not liable to general taxation.

Are the other parcels liable to such taxation? As shown by the foregoing statement, the greater portion of parcels 1, 2, 3, 5, and 7 are, by the consent of complainant, in the exclusive possession of private individuals, and exclusively used by them for their individual business. In the case of the elevator, that business is the purchasing and storing of grain. In the case of the wood and coal yards, that business is the sale of coal and wood. In such business complainant could not lawfully engage. When, by the consent of a railway company, its land is exclusively devoted to a business in which it cannot lawfully engage—a business foreign to the purpose of its organization—such land is not, in my judgment, "actually occupied" by it, and is "not necessary or in use in the proper operation of its road," and is, therefore, under the statute above quoted, taxable "like other real estate in the several townships or municipalities in which the same may be situated." It is true that there is a relation between complainant's business and the business carried on upon this land. That relation arises from the fact that complainant transported the coal, wood, and lumber sold on these several parcels, and will transport or has transported the grain purchased and stored in the elevator. If this relation affords a ground for exemption, I think we must say that all lands of a railway company used for the storage, purchase, manufacture, or sale of goods which have been or are to be carried by it are exempt from taxation. If so, land of a railway company occupied by a grocery store for the sale of groceries carried by it, land occupied by a dry goods store for the sale of dry

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goods carried by it, land occupied by a clothing store for the sale of clothing carried by it, and land occupied by a saloon for the sale of liquors carried by it are all exempt from taxation. And I cannot see why, by the same reasoning, the buildings on said land and the goods stored, purchased, manufactured, or sold thereon are not also exempt. The principle which leads to such consequences cannot, in my judgment, be sound. I think, therefore, that the parts of parcels 1, 2, 3, 5, and 7 which were exclusively in the possession of private individuals, and exclusively used by them for their individual business, were liable to taxation like other real estate. This conclusion is supported by authority.

Under a charter which provided "that no other or further tax or imposition [than the specific tax therein provided] shall be levied or imposed upon the said company," it was held by the Supreme Court of New Jersey that docks of a railway company leased for lumber yards, for which rent or equivalent compensation was paid, were liable to general taxation. See *State v. Newark*, 25 N. J. Law, 315. The judgment in that case was affirmed by the Court of Errors and Appeals. See *Id.*, 26 N. J. Law, 519. Under a similar provision in a charter it was held by the last-named court that property leased by a railway company for a coal yard was liable to general taxation. See *Cook v. State*, 33 N. J. Law, 474. It appears from the case last cited that the test of taxability was the profit derived from renting the land. While I do not think this is the test under our statute, which, as already indicated, differs from the New Jersey statute, still, if that test were applied, it would not, in my judgment, help complainant. For while it appears that those who used the land in question paid no rent, it does appear that as a consequence of that occupancy the railway company materially augmented its earnings by carrying their freight. Complainant did, therefore, receive compensation for the occupancy.

The decisions of our own and other states (see *Detroit, etc., Station Co. v. Detroit*, 88 Mich. 347, 50 N. W. 302; *Pennsylvania, etc., R. Co. v. Mayor of Jersey City*, 49 N. J. Law, 540, 9 Atl. 782, 60 Am. Rep. 648; *Railway Co. v. Bayfield*, 87 Wis. 188, 58 N. W. 245) which hold that elevators erected for the purpose of facilitating the loading and unloading of grain carried by railways are not liable to taxation clearly have no application to the land exclusively used by private individuals for the business of conducting coal or wood yards, as appears from the following quotation from the opinion in *Detroit, etc., Station Co. v. Detroit*, *supra*: "This elevator is as essential and necessary to the complainant in the handling of its grain as is its depot for the use of passengers, or its freight depot for the handling of the general merchandise it carries." Neither do these decisions apply to the land occupied by the Brown elevator. Those decisions

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are authority for the proposition that elevators which railroad companies are empowered to erect and operate are not liable to general taxation. Railway companies have not, as had the complainant station company in Detroit, etc., *Station Company v. Detroit*, supra, any express authority to own and operate an elevator. They undoubtedly do have an implied authority to erect any elevator which enables them to better perform their obligation as common carriers of grain. It is obvious that such elevators—like the elevator in question in Detroit, etc., *Station Co. v. Detroit*, supra, and in the other cases last cited—afford equal advantages to all shippers. They are not, like the elevator in the case at bar, devoted to the exclusive use of a single person engaged in the business—a business which complainant itself could not carry on—of purchasing and shipping such grain. The distinction between the business of running an elevator to facilitate the carriage of grain and of running it as a public warehouse for the storage of grain has been made. See *Railway Co. v. Milwaukee*, 34 Wis. 271; *In re Swigert*, 119 Ill. 84, 6 N. E. 469. And it is held that the first class of elevators are not liable to taxation, and that the second are. It is apparent that these authorities go much farther than it is necessary to go to justify the conclusion that the land occupied by the elevator in question is liable to taxation.

It is contended that our own decision of *Auditor General v. Flint, etc., R. R. Co.*, 114 Mich. 682, 72 N. W. 992, is opposed to this decision. In that case the Auditor General undertook to sell a part of the terminals and depot grounds of the railroad company situated in Bay City. It was held by this court that this could not be done, even though it appeared that two lumber firms “also occupied a part of the docks.” I think it may be inferred from the record in that case, as pointed out in the opinion of my Brother Hooker, that certain portions of the land assessed were in the exclusive occupancy of these lumber firms who used the same for carrying on their individual business of running a lumber yard. The contention that these portions of the land were taxable because they were used exclusively for a business foreign to that of a railway company does not seem to have been presented to the court, or considered by it. And, if it had been, it would not have affected the decision. Had such a contention been made, the court could have answered it by saying the state has no power to sell this entire description of land, most of which is exempt from taxation, because a portion of it is not exempt. See *Osborn v. Hartford & New Haven R. R. Co.*, 40 Conn. 491. In my judgment, therefore, *Auditor General v. Flint, etc., R. R. Co.*, supra, is not opposed to the views stated in this opinion.

It is said that, as the state has once taxed these earnings, it is unjust for it to also tax the land the use of which contributed to augment them. This charge of injustice is not

well founded. It is true that, except for their arrangement with complainant, the lumber dealers and coal dealers who occupied its land would not have shipped their lumber and coal over complainant's road; but either they or other dealers who supplied the city of Grand Rapids would in that event have shipped it over other railroads. The earnings of railroads liable to state taxation were therefore entirely unaffected by the arrangement between complainant and the occupants of its land. The truth is that complainant, by granting to these lumber and coal dealers a special privilege, *viz.*, the privilege of occupying its land without paying rent, which gives such dealers an advantage over their competitors, has been enabled to obtain the carriage of their freight, which otherwise would have been carried by its competitors. In other words, the railway company, by giving the lumber and coal dealers an advantage over their competitors, obtains an advantage over its competitors. If this arrangement is proper, it is beneficial only to the lumber and coal dealers and to complainant. It in no way inures to the benefit of the public, and therefore does not entitle complainant to any public consideration.

Neither is it true that the arrangement for the occupancy of these parcels of land was beneficial to the city because it resulted in the erection of buildings which are subject to taxation. It must be assumed that, if this arrangement had not been made, these buildings would have been erected in some other part of the city, where they would have also been subjected to taxation. It was, therefore, a matter of indifference to the city where they were erected. Nor would these buildings have escaped taxation if the railroad company had itself erected them. It is true that, if it had used them for some legitimate railway purpose, they would have been exempt; but, if they had been used as these were, it is clear that under the reasoning of this opinion they would not have been. We do not hold these parcels of land liable to taxation simply because of the use to which they are put, but because that use proves that the land is "not actually occupied" by complainant, and is "not necessary or in use in the proper operation of its road." And the statute (section 6277, Comp. Laws 1897) in express terms makes all land of this description liable to taxation. See *St. Paul v. Railway Co.*, 39 Minn. 112, 38 N. W. 925; *Railway Co. v. Milwaukee*, *supra*.

Complainant, as additional grounds for relief, contends: (a) That the description of the third parcel is fatally defective. (b) The assessment of the first, second, and third parcels is void because included in one description, and under one valuation, are distinct parcels owned by complainant and the Michigan Central Railroad Company. (c) Included in every description are parts which are certainly exempt.

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The ground upon which it is claimed that the third description is defective is that there is no means of knowing what is described by this exception: "Also except part used for G. R. & I. and M. C. R. R. Company's right of way." The right of way of the Grand Rapids & Indiana Railway Company is shown by a deed made in 1870 and duly recorded. There is nothing to indicate, and it should not be presumed, that the right of way of the Michigan Central Railroad Company is not also shown by a similar recorded deed. We cannot say, therefore, that the description was not good under our decision in *Harts v. City of Mackinac Island* (Mich.) 92 N. W. 351.

The other objections, if valid, would prevail if they were asserted in a suit at law or as a defense to a suit to enforce the tax. See *Auditor General v. Flint, etc., R. R. Co.*, supra. But here complainant is seeking relief in a court of equity. Part—the greater part—of these parcels of land is justly liable to taxation. Equitably complainant should pay the proportionate tax justly assessable against such part. It never offered to pay, and now objects to paying, that. Complainant seeks to be relieved from the entire burden of taxation, part of which, equitably, it ought to bear. It seeks equity, but declines and has declined to do what is equitable. Nor has it presented to us a record which enables us to make any just correction in the decree appealed from—a decree which relieved complainant from the payment of part of the taxes under consideration. Under these circumstances the objections under consideration do not entitle complainant to relief. See *Palmer v. Napoleon*, 16 Mich. 176; *Merrill v. Humphrey*, Auditor General, 24 Mich. 170; *Conway v. Waverly*, 15 Mich. 257; *Tisdale v. Auditor General*, 85 Mich. 261, 48 N. W. 568.

It follows that, in my judgment, complainant is entitled to a decree enjoining the sale of parcel 10, and that the decree appealed from so far as it relates to the other parcels should be affirmed. Complainant will have costs in this court.

MOORE, C. J., and MONTGOMERY, J., concurred.

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(Supreme Court of Iowa, Oct. 21, 1904.)

[101 N. W. Rep. 94.]

Intervention—Dismissal.

A party who voluntarily intervenes, without being substituted as defendant or notified to defend the action, may voluntarily dismiss his petition of intervention, and withdrawing it is equivalent to a dismissal.

Same—Same.

A party who has voluntarily intervened, and afterward dismissed his petition of intervention, is not thereafter within the jurisdiction of the court, and no costs can be taxed against him.

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Appeal—Costs.

A motion for the retaxation of costs in the trial court is not a necessary prerequisite to the consideration of the question of costs on appeal, where the objection is to the taxation of any costs, and not to the amount of costs taxed.

Eminent Domain—Assessment of Damages—Improper Construction of Railroad Overflow—Damages—Evidence.

In a proceeding to assess damages for the appropriation of land for a railroad right of way, there was evidence that an embankment which confined the waters of a lake had been cut, so as to allow the water to overflow the land, to its damage: *held*, that evidence that it was not proper to cut the banks in this manner was admissible, inasmuch as only the damage caused by the construction of the road was recoverable in this proceeding, another action being necessary for the recovery of damages arising from the negligent construction of the road.

Same—Same—Same—Expert Testimony.

In a proceeding to determine the damage from the appropriation of land for a railroad right of way, the question whether or not the cutting of certain ditches was necessary for the construction of the road-bed was a proper subject for expert testimony.

Same—Same—Same—Intention to Restore Embankment.

In a proceeding to determine the damage from the condemnation of a railroad right of way, in which it appeared that the land was damaged by water escaping from a cut which the railroad company had made in an embankment, there was evidence that the making of this cut was unnecessary and improper, and the court charged that if the company intended to restore the embankment, and this would obviate damages from the overflow, no damages occasioned by cutting the embankment could be considered, otherwise such damages should be allowed: *held*, that this instruction was erroneous, inasmuch as the railroad company was not liable to damages caused by the improper cutting of the embankment, without regard to its intention.

Curing Error.

This instruction did not cure, but rather aggravated, the error in rejecting evidence that the cutting of the embankment was unnecessary and improper.

Eminent Domain—Assessment of Damages—Improper Construction of Railroad—Evidence—Material for Restoration of Embankment.

In a proceeding to assess damages for the appropriation of a railroad right of way, it was shown in the construction of the road that an embankment inclosing a lake had been cut so as to allow the water to escape on plaintiff's land and damage it: *held*, that evidence as to the ease with which material for the restoration of the bank could be obtained was not admissible.

Farm Crossings—Duty of Railroad—Statute.

Under Code 1873, § 1268, providing that, when any person owns land on both sides of a railway, the railway company shall, when requested, make and keep in good repair one cattle guard and one causeway, or other adequate means of crossing, etc., the duty of determining the kind of crossing is imposed on the railroad company, the only requirement being that it shall be adequate, and there is no rule requiring the construction of a grade crossing if it can be reasonably provided.

Appeal from District Court, Appanoose County; M. A. Roberts, Judge.

Such proceedings were had as that on the 16th day of April, 1902, a sheriff's jury assessed the damages for appropriating a right of way by the Iowa & St. Louis Railroad Company across 40 acres of Andrew Guinn's farm at \$300. An appeal to the district court was taken by the landowner, and upon

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trial the damages were increased to \$1,584. The company appeals. Reversed.

J. G. Trimble and F. S. Payne, for appellant.

C. F. Howell, J. M. Wilson, and W. R. C. Kendrick, for appellee.

LADD, J. Before trial the Quincy, Omaha & Kansas City Railway Company filed a petition of intervention, alleging that, since the condemnation proceedings were begun and the appeal taken, it had purchased the right of way and property interest of the defendant and was the real party in interest, and prayed that judgment be entered against the landowner for costs. It then moved for a continuance, and, this being denied, withdrew its petition, to which plaintiff objected. The court overruled the objection, but seems to have held that the withdrawal did not withdraw intervenor from the jurisdiction of the court. At plaintiff's instance it was adjudged to be in default for want of an answer, and upon the conclusion of the trial \$200 was allowed as attorney's fees and taxed as part of the costs, and judgment entered against intervenor and defendant for all costs. The intervenor had not been substituted as defendant, nor notified in any way to defend in the action. It had the perfect right, as it had voluntarily appeared, to voluntarily dismiss its petition of intervention, and withdrawing it was equivalent to a dismissal. *Dalhoff v. Coffman*, 37 Iowa, 283; *Wilson v. Trowbridge*, 71 Iowa, 345, 32 N. W. 373; *Woodward v. Jackson*, 85 Iowa, 432, 52 N. W. 358. After it had done this, there remained no issue as to it in the case. It was then neither demanding a remedy, nor was anything claimed of it, and its presence in court was evidenced in no way save the court's ipso dicit that it remained within its jurisdiction. This, however, did not make it so, and in withdrawing its petition the intervenor ceased to be a party to the record. It follows that the judgment for costs was entered without jurisdiction. Authorities cited by appellee to the effect that before the taxation of costs by the clerk may be corrected in this court a motion for that purpose must have been ruled on by the district court are not in point, for the complaint here is not of the amount of the costs, but that any judgment whatever was rendered therefor. *Ainley v. Ins. Co.*, 113 Iowa, 709, 84 N. W. 504. In such a case, as the ruling has been once entered, there is no occasion for calling on the trial court to review its ruling again before bringing the matter to this court.

2. The defendant's railroad runs through the 40 acres from the north in a southeasterly direction. On the 40 acres adjoining on the north is a lake. Along its south side was a bank of earth, which prevented water flowing therefrom on plaintiff's farm. The road crossed this lake, and in constructing it a part of the embankment on each side of the track

was removed, and this allowed the water to flow from the lake. The evidence showed that at a cost of \$20 the earth could be replaced in the bank. An engineer was asked whether it was proper, in the construction of the road, to cut the banks and open the ditches. An objection to this was sustained, on the theory that the defendant was not in a position to urge that its road had not been properly constructed. It was ruled otherwise in *King v. Ry.*, 34 Iowa, 459. The damages to be assessed are those "which said owner will sustain by the appropriation of his land for the use of said corporation." This does not contemplate injuries to the realty resulting from the negligent construction of the road. Such damages may be recovered in a proper action, but are not elements in fixing the value of the land taken or the compensation to be allowed the owner. *Miller v. Ry.*, 63 Iowa, 680, 16 N. W. 567. See *Doud v. Ry.*, 76 Iowa, 438, 41 N. W. 65. Appellee urges that in any event the propriety of the ditches was not a matter of expert evidence, and the competency of the engineer was not shown. The last of these objections was not urged in the trial court, and the first we do not regard as well taken. The ditches were excavated for drainage, and whether this was necessary in the safe construction of the roadbed was an appropriate inquiry to persons skilled in such matters. True, the evidence leaves little, if any, doubt but that a proper construction of the road did not require the excavation of the ditches, and that the embankment could be restored at small expense. Conceding this, however, the error in the ruling is emphasized, rather than cured, as contended in the instructions, for in the eleventh paragraph the jury was told, in substance, that if the company intended to restore the embankment, and could do so at a cost of \$20, and if this would obviate damages from the overflow from the lake, no damages occasioned by cutting the bank of the lake should be considered; otherwise such damages should be allowed. The intention of the railroad company is entirely immaterial. It can neither escape nor incur damages in such a case because of its good or evil purposes. If, in the proper construction of the road, the ditches ought not to have been excavated, neither their existence nor the damages resulting therefrom should have been taken into consideration in *ad quod damnum* proceedings.

3. From what has been said it necessarily follows that evidence as to the character of the soil of the Charitan river bottom ought not to have been received. Whether the bank may be permanently restored is not relevant to the issue as to whether it ought to have been disturbed in the proper construction of the road. Evidence that clay for the restoration of the bank could be obtained 1,600 feet away was rightly rejected. Such evidence, as well as the cost, might be appropriate in an action for damages, but not in proceeding like this.

4. Near the south side of the land the railroad crosses Spring creek over a tressel bridge consisting of 10 spans, in all 136 feet long. The remainder of the way the roadbed is filled to a grade of an average of over four feet above the surface. A serious question in the case was whether the private crossing which plaintiff might demand would be an under or grade crossing. On this feature of the case the court instructed that: "By the term 'adequate' crossing is meant one equal to what is required; suitable to the case or occasion; fully sufficient; proportionate to the reasonable requirements. But an adequate crossing does not necessarily mean either an over or an under crossing; it may be either, and the landowner may designate the place. The plaintiff in this case insists that the crossing shall be a grade crossing. That is the rule in this state, and, there being no evidence that a grade crossing could not be reasonably provided, it will be your duty to consider that the crossing to be put in will be a grade crossing at such reasonable place as the plaintiff may designate, and will estimate plaintiff's damages accordingly, unless you find there was some agreement to the contrary." Appellant takes exception to that portion in which it is said grade crossings are the rule in this state, and that it must be assumed that defendant will furnish that kind of a crossing. In *State v. Ry.*, 86 Iowa, 304, 53 N. W. 253, grade crossings were referred to as the rule in this state, and in *State v. Ry.*, 99 Iowa, 565, 68 N. W. 819, in discussing the statute, the court said that, "owing to the topography of the state and the usual size of farms, grade crossings are usually adequate, and hence, are the rule in this state. The intent of section 1268 [Code 1873] plainly is that, when requested, the landowner is entitled to a causeway, a grade crossing, properly guarded, that will be adequate means of crossing; and when, from any cause, this cannot be, he is entitled to have such other means of crossing as will be adequate. * * * Our view of section 1268 [Code 1873] is that adequate means of crossing is what the landowner is entitled to, and, when that cannot be provided by a surface crossing at a reasonable place, it must be by such other or additional means as are adequate." All intended in either of these cases was that, owing to the topography of the country, and the cost of construction, and the convenience of the landowner, private crossings in this state are usually at the surface. In the first case the relief sought was the enforcement of an order by the railroad commissioners to construct an overhead crossing, and in the last to put in an under crossing. The only issue was as to whether existing surface crossings were adequate, and the court held they were. In both, the kind of crossings was directly involved. In a case like this the particular manner of crossing is not in issue, and, whatever the opinion of the jury or court, the conclusion would not be binding on the parties in a subsequent action to compel the

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construction of an adequate crossing. In *Lough v. Ry.*, 116 Iowa, 31, 89 N. W. 77, an instruction that "whether such adequate crossing will be a surface crossing or an under crossing you have nothing to do with in this case" was expressly approved. See, also, *Pingery v. Ry.*, 78 Iowa, 438, 43 N. W. 285. The statute expresses no preference for one kind of crossing over another. For all of its provisions it may be open, closed, over the railroad or beneath it, so long as the company "shall, when requested so to do, make and keep in good repair one cattle guard and one causeway, or other adequate means of crossing the same, at such reasonable place as may be designated by the owner." The duty of determining the kind of crossing is imposed on the company, with the one limitation that it be adequate. Appellee suggests that the evidence was conclusive that only a surface crossing would be adequate. We think the record such as to leave that inquiry open, and that the instruction was erroneous in saying to the jury what means of crossing defendant would be bound to provide.

Reversed.

McLEOD v. CHICAGO & N. W. RY. CO. et al.

(Supreme Court of Iowa, Oct. 20, 1904.)

[101 N. W. Rep. 77.]

Accident at Crossing—Collision between Train and Street Car—Injury to Motorman—Contributory Negligence—Failure to Look—Attention Diverted.

In an action against a railroad by the motoneer of a street railroad for injuries resulting from defendant's engine colliding with the motor which plaintiff was operating, through the alleged negligence of defendant, where plaintiff testified that he was watching the conductor of the car which he was operating, who had gone across the railroad tracks to signal plaintiff to bring his car forward, so that plaintiff did not see the approaching engine until it was too late to avoid the collision; that he was not required to rely solely on the conductor's signal, but was expected to assure himself of the safety of the crossing before venturing on it; that, if he had looked, he could have discovered his danger, and avoided the accident; that he did not look, and that the only reason for failure to look was the attention he was giving to the signal of his conductor—he was chargeable with contributory negligence as matter of law.

Fellow Servants—Application of Statute—Whether Street Railway a Railroad.*

Code, § 2071, abrogating the fellow-servant rule as to certain employees of "every corporation operating a railway," does not apply to corporations operating street railroads and owning lines extending to other towns and cities, notwithstanding Acts 29th Gen. Assem. p. 50, c. 81 (Code Supp. p. 212) § 2, providing that the words "railway" and "railway corporation," "railroad" and "railroad corporation," wherever used in the statutes, shall include all interurban railways and all companies and corporations "constructing, owning, or operating interur-

*As to whether a street railway is a railroad within the meaning of statutes, see foot-note appended to *San Francisco & S. M. E. Ry. Co. v. Scott* (Cal.), 11 R. R. R. 819, 34 Am. & Eng. R. Cas., N. S., 819.

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ban street railways," in view of section 3, providing that any interurban railway shall, within the corporate limits of any city or town, on such streets as it shall use, be deemed a street railway, and subject to the laws governing street railways.

Incompetency of Conductor—Sufficiency of Evidence.

In an action against a street railroad by a motoneer in its employ for injuries resulting from a collision of the motor which plaintiff was operating with a railroad train, through the alleged negligence of the conductor of the car plaintiff was operating in signaling the plaintiff across the track, based on the incompetency of the conductor, evidence examined, and *held* insufficient to show that the conductor was incompetent.

Vice Principals—Conductors.†

In an action against a street railroad by a motoneer in its employ for injuries resulting from a collision of the motor which plaintiff was operating with a railroad train through the alleged negligence of the conductor of the car which plaintiff was operating in signaling the plaintiff across the tracks, evidence examined, and *held* insufficient to show that the conductor was defendant's vice principal, so as to charge defendant with his negligence.

Appeal from District Court, Woodbury county; John F. Oliver, Judge.

The opinion states the case. Affirmed.

F. E. Gill and Hubbard & Burgess, for appellant.

James C. Davis and T. F. Bevington, for appellee Chicago & Northwestern Railway Co.

J. S. Lawrence, for appellee Sioux City Traction Co.

WEAVER, J. The Chicago & Northwestern Railway Company operate a line of railway having a terminal in the city of Sioux City, Iowa. The Sioux City Traction Company operates an electric street car system in the same city. In connection with and as a part of the same general system, the traction company owns a trolley line extending from the central station in said city across a bridge which spans the Missouri river to a point in the state of Nebraska. One of the street railway track crosses the track of the Chicago & Northwestern Railway within the corporate limits of Sioux City, at the intersection of Dace and Lafayette streets. On January 23, 1903, the plaintiff was a motoneer in the employ of the traction company, and was moving a car eastward on Dace street in the direction of the crossing. At a point about 20 feet from the intersection of the two tracks, plaintiff stopped the car; and the conductor, as was his duty, went ahead to the opposite side of the track to ascertain whether the crossing could be made in safety. It is the claim of plaintiff that the conductor beckoned him forward, and in response to the signal he set the car in motion. Just at that time an engine, moving from the south, came in collision with the car, and plaintiff was injured. It is alleged that the railway

†As to whether a conductor is a vice principal or a fellow servant with respect to the other trainmen of his train, see foot-note appended to *Grout v. Tacoma Eastern R. Co.* (Wash.), 10 R. R. R. 253, 33 Am. & Eng. R. Cas., N. S., 253.

company is chargeable with negligence in respect to the collision, because the engine gave no signal or warning of its approach, and was being operated at a high and dangerous rate of speed, in violation of the ordinances of the city. Negligence is also imputed to the traction company because of the alleged carelessness of the conductor of the car in signaling the plaintiff across the track. Both defendants took issue upon the allegations of the petition, and the cause was tried to a jury. At the close of the testimony the defendants severally moved for a directed verdict in their favor. Both motions were sustained, and upon the verdict thus returned there was judgment against plaintiff for costs, and he appeals.

1. We will first consider the case made against the railway company. Without stopping to review the testimony, we will say there was evidence as to the rate of speed at which the engine was moving, and of the failure of the enginemen to give signal or warning of their approach, which would have justified the jury in finding the railway company negligent. We have, then, next to inquire whether plaintiff shows himself free from contributory negligence. Under the law of this state the burden is upon him to show that he exercised reasonable care for his own safety, and, if he failed to make such showing, or if the facts developed conclusively and affirmatively demonstrate that he did not exercise such care, and that such omission contributed to bring about the collision, then he cannot recover, and the trial court was right in its ruling. It is the claim of the plaintiff that he stopped his car within 20 feet of the crossing, and that as he stopped he looked to the south, and saw no engine approaching. He then waited for the conductor to reach the other side of the track and signal him across, and, having received the signal to go forward, he at once undertook to obey, and was struck as before stated. Under many circumstances this testimony might well be taken as sufficient to carry the question of contributory negligence to the jury; but it has often been held that, where the situation and surroundings are without controversy shown to be such that, had the person looked in the direction of an approaching train, he could not have failed to see it, his testimony that he did look and did not discover it raises no issue upon which a party is entitled to demand a verdict. *Artz v. R. R.*, 34 Iowa, 153. It is equally well settled, and the rule is too familiar to justify the citation of authorities, that one who approaches the crossing of a railway track upon which there is coming in plain sight a train or engine which is liable to reach the crossing before he can safely pass to the other side, and without looking to discover his danger and without any intervening circumstance which may reasonably operate to direct or distract his attention he goes forward and is injured, he is held guilty of contributory negligence as a matter of law. The undis-

puted facts in the record before us bring the case within the rules just cited. Stating the situation as given by the plaintiff himself, the motor of his car was in good order, and at the rate at which the car was moving when struck he could bring it to a stop within a distance of four or five feet. He was perfectly familiar with the situation, having operated a car over it 20 or more times every day for several years. Approaching the crossing from the west, he had the car under complete control, and brought it to a full stop. The railway track which he was about to cross extended in a straight line to the south at least 1,000 feet, and from the point where the car was stopped the view to that distance was open and unobstructed, unless it be that certain telegraph or telephone poles created a partial screen in that direction. He did look just as he brought the car to a stop, and says he did not see the engine approaching. If it be true that the poles interfered with his view at that point, it is also true that passing the range of the poles, and before reaching the crossing, there was a clear space in which, had he looked, he must have discovered his danger in time to avoid it. He says: "While I was standing still with the car I never looked to the north or south for an approaching train. I was watching the conductor. I listened, and heard no car. Then I started my car, and looked north, and saw no engine coming. When I looked south, I was so close to the track that I couldn't stop the car until I came in collision with the locomotive. If I had looked south, I could have seen that engine coming three blocks. I couldn't look three ways. I was watching the conductor. I couldn't look south or north and watch the conductor. I would have seen the engine if I had looked south just before I started, if these posts wouldn't have obstructed my view. I recognize that as a photograph of the place of the accident. I recognize those as the trees mentioned as being south of the track, and those as the posts I have spoken of. I think it would obstruct the view. The three posts shown in the photograph are about twenty feet from the track. After you get past the trees and posts you have an unobstructed view, looking south beyond the Floyd Bridge, after you get here (indicating point in photograph). Before you reach the telephone poles, you have an unobstructed view south of the Northwestern track. After you leave the telephone poles, you have another unobstructed view. You can see down to the curve. * * * I could have turned my head to the north, and then to the south, before I put on the power, but I didn't. I started the car when he signaled." On cross-examination he also says that one of the rules of his employment required him to bring his car to a full stop, and look and listen, before moving his car over a railway crossing, and adds: "The rule was in force. It was not exactly my understanding that all I had to do was to rely on the conductor, and that I need not look or listen at all. I knew that I had to look and listen."

The conductor of the car, testifying as a witness for the plaintiff, says that as the car was approaching the crossing he stood upon the front platform, which was the motorman's place of duty, and while still 150 feet from the intersection of the tracks he saw the engine coming up from the south about 1,000 feet away—a distance of more than two blocks. He says: "There wasn't anything to obstruct my view of the approaching engine when I was about one hundred and fifty feet from the crossing. McLeod, from where he stood, had the same view of the engine that I had." At a distance about 25 feet from the crossing the conductor jumped to the ground and ran ahead of car across the railway track, and as he went "saw the engine coming perhaps 400 or 500 feet away." He denies having signaled plaintiff to cross, but in this respect there is a conflict in the testimony, and for the purposes of this appeal we may accept plaintiff's statement as correct. The photographs exhibited in evidence may be, as counsel claim, more or less misleading in some matters of detail, exaggerating some features and minimizing or obscuring others, but they are not without material value in illustrating and explaining the stories told by witnesses who are familiar with the place of the accident and its physical surroundings. Taking the case as a whole, it is shown without controversy that, if plaintiff did look to the south, as he says he did, before stopping his car—that is, if he looked along the railway track to discover whether the crossing was endangered by a moving train—it was physically impossible that he should not have discovered the engine with which he collided. Furthermore, he knew it was his duty not to rely wholly on the signal of the conductor, but for his own protection, and for the protection of the passengers in his car, he was bound not only by an express rule of his employment, but by the ordinary obligation of reasonable care, to look as well as listen, and assure himself that the crossing could be safely made. This he admits he did not do. His only excuse for this failure is that he could not look in two or three different directions at the same time. But this explanation does not explain. From the spot where he last started the car to place of danger was twenty feet. He says he could have stopped in a distance of four or five feet. To look to the north and to the south and to the conductor across the track was the work of but a single sweeping glance, requiring only the small fraction of a second, but plaintiff tells us that at no instant after putting his car in motion did he look south at all until it was too late to avoid the result of his recklessness. He claims to have received the conductor's signal to cross before he started his car from the place where it was standing 20 feet west of this track. If this was so, then there was no occasion whatever for him to keep on "watching the conductor," as he says he was doing, as he went upon the crossing. Plaintiff having conceded that

he was not required to rely solely upon the conductor's signal, but was expected to assure himself of the safety of the crossing before venturing upon it; that, if he had looked, he could have discovered his danger, and avoided the collision; that he did not look, and that the only reason for the failure was the attention he was giving to a signal, which he was not expected to obey until he had himself ascertained that the way was clear—we think it must be said as a matter of law that he is chargeable with contributory negligence, and cannot recover. If he had looked, and had in fact seen the engine approaching at such distance that, if moving at a lawful rate of speed, it could not have reached the crossing in time to collide with his car, and, without knowing that it was moving at excessive speed, he undertook to cross the track, and was run down and injured, it may well be that the case should have gone to the jury under the doctrine of *Moore v. R. R. Co.*, 102 Iowa, 595, 71 N. W. 569, and other cases of that nature cited by the appellant. But he does not claim to have been thus deceived or misled. He did not look at all after he stopped the car for the express purpose of looking and ascertaining whether he might proceed in safety, and thus contributed very materially to the disaster.

2. Assuming the truth of the plaintiff's contention as to the facts, can the traction company be held liable for his injury? If such liability is held to exist, it must be upon the theory that the company is chargeable with the negligence of the conductor in signaling the plaintiff to take his car over the crossing. The rule which exempts an employer from liability to an employee for injury occasioned to the latter by the negligence of a fellow servant is maintained by the courts of this state, except as the same has been abrogated by statute for the benefit of certain employees of railway corporations. Code, § 2071. It follows, then, that to entitle plaintiff to recover in this case it is necessary for us to find that he comes within the description of persons for whose benefit the statute was enacted, or find that the conductor was, as to him, the vice principal of their common employer. The employer's liability act, to which reference is here made, applies in terms to "every corporation operating a railway." This phrase, in its broadest and most general sense, is sufficient to include a street railway corporation, but in ordinary parlance the word "railway" or "railroad," when not qualified by the word "street," or other expression of similar import, has special reference to what are sometimes denominated "commercial railroads." By this is meant those larger, more expensive, and more permanent lines or systems extending from town to town and city to city, accommodating a heavier and more miscellaneous traffic, and requiring larger forces of employees, who are exposed to greater risks than is the case with street car lines and systems. It is in this more restricted sense that we feel

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compelled to interpret Code, § 2071. The distinction we have here drawn was recognized and upheld by us in *Fidelity Loan & Trust Co. v. Douglas*, 104 Iowa, 532, 73 N. W. 1039, and *Cedar Rapids & M. C. Ry. v. Cedar Rapids*, 106 Iowa, 476, 76 N. W. 728. In the former case we had occasion to construe Code 1873, § 1309, which provided that a judgment against "any railway corporation" for injury to persons or property should be a lien on its property prior and superior to liens of mortgages and trust deeds. In the latter case the controversy was upon the construction of Code 1873, § 1317, providing for the assessment by the executive council of "all the property of each railway corporation in this state." The language in each instance was as broad and general as that employed in Code, § 2071, and in each instance we held that street railways and street railway corporations were not included within the meaning of the statute. This distinction was foreshadowed in *Sears v. Ry. Co.*, 65 Iowa, 742, 23 N. W. 150. It is argued, however, that the distinction, if it ever existed, has been abrogated by the enactment of chapter 81, p. 49, Acts 29th Gen. Assem. Code Supp. p. 212. It is said that, as the tractional company had an interurban line between Sioux City, Iowa, and South Sioux City, Neb., its entire system is to be regarded interurban, and that under the operation of the statute just referred to it is a "railway" in the strict sense of the word, and subject to all the liabilities which the laws of the state impose upon railways in general. Even if we concede, though we do not decide, that the extension of one of its lines or branches beyond the corporate limits of the city to another city would make the entire system in some sense "interurban," a reading of the statute demonstrates that it cannot have the effect which counsel claims for it in bringing the present case within the terms of Code, § 2071. It is true that section 2, p. 50, of the chapter, provides generally that the words "railway" and "railway corporation," "railroad" and "railroad corporation," wherever used in our statutes, shall apply to and include all interurban railways and all companies and corporations "constructing, owning, or operating interurban street railways"; but the next section further provides that "any interurban railway shall within the corporate limits of any city or town, upon such streets as it shall use for transporting passengers, mail, baggage, and such parcels, packages and freight as it may carry in its passenger or combination cars only, be deemed a street railway and subject to the laws governing street railways." This statute clearly recognizes that the legislation theretofore enacted did not generally have application to street railways, and it was sought to extend such legislation over interurban lines, but to reserve from the operation of that enactment so much of the interurban lines as occupy city streets. Within such streets they are to be treated and considered in law as street rail-

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ways. We therefore hold that chapter 81, p. 49, Acts 29th Gen. Assem., has not the effect to bring the traction company within the operation of Code, § 2071. This being the case, we have only to ask whether there was anything in the plaintiff's case which, as a matter of common law, would have justified the jury in finding the defendant liable for the negligence of the conductor of its street car. It is alleged in the petition that he was incompetent for the position in which he was placed by the company, but there is no evidence whatever in support of the charge. Neither is there any evidence from which the court or jury could properly infer that he was a vice principal of the master. The extent of his authority over the movement of the car or the work of the plaintiff is not shown. It is shown, however, that plaintiff was not required to rely upon the signal of the conductor in crossing a railway track, but was under instruction from the master to himself to stop his car and look and listen before attempting a crossing. With this record it needs no argument to demonstrate that the conductor was not shown to be a vice principal of the employer.

The ruling of the trial court was correct, and the judgment is affirmed.

CHICAGO & M. ELECTRIC R. CO. v. CHICAGO & N. W. RY. CO.
(Supreme Court of Illinois, Oct. 24, 1904.)

[71 N. E. Rep. 1017.]

Eminent Domain—Assignment of Errors.

Petitioner in condemnation proceedings sought to condemn two tracts of land. The owner interposed a motion to dismiss the petition as to both. The motion was sustained as to the first, and judgment dismissing the petition as to that tract was entered, while the motion as to the second tract was overruled, and a judgment fixing the amount of damages was rendered. The petitioner appealed from the judgment of dismissal: *held*, that the owner was not entitled to assign as cross-errors that the court erred in overruling the motion as to the first tract.

Same—Right to Condemn Land of Another Railroad Company.*

A railroad company, after having acquired a 25-foot right of way, on which it operates a railroad track, may condemn land of another railroad company for an additional right of way up to the statutory limit of 100 feet in width, on which it may lay as many tracks as it sees fit.

Same—Same—Constitutional Law.

The condemnation of such tract for the purpose of laying an additional track, to be operated, in conjunction with the existing track, as a double-track railroad, does not violate Const. 1870, art. 11, § 11, forbidding a railroad from owning a parallel or competing line.

Same—Same.

A railroad company which purchased from another company a right

*As to the right to condemn the land of a railroad company, see footnote appended to *Atchison, etc., Ry. Co. v. Kansas City, etc., Ry. Co.* (Kan.), 8 R. R. R. 894, 31 Am. & Eng. R. Cas., N. S., 894, where all the preceding authorities in this series are collected or referred to (in this case it was held that an attempted condemnation of land of another company was void as an entirety because part was in actual and necessary use for railway purposes).

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of way 25 feet in width, on which a railroad track was constructed, has the power to locate an additional track on land adjacent to the right of way, and may for that purpose condemn an additional strip.

Same—Same.

A railroad company cannot condemn longitudinally the right of way of another railroad company of the width of 100 feet, authorized by the statute, but may condemn a strip adjoining the statutory right of way.

Same—Same.

In proceedings by a railroad company to condemn land belonging to another railroad company, the question whether the strip sought to be taken is necessary for the present or immediate future uses of the railroad company owning it, in connection with the business of operating its railroad, so as not to be subject to condemnation, is a question of fact.

Same—Same.

In proceedings by a railroad company to condemn land for a right of way belonging to another railroad company, evidence examined, and held that the land sought to be taken was not necessary for the present or immediate future uses of the latter railroad in connection with the business of operating its railroad, and was subject to condemnation.

Cartwright, J., dissenting.

Appeal from Lake County Court; D. L. Jones, Judge.

Condemnation proceedings by the Chicago & Milwaukee Electric Railroad Company against the Chicago & Northwestern Railway Company. From a judgment dismissing the petition as to one tract south to be taken, plaintiff appeals, and defendant assigns as error that the court erred in overruling its motion to dismiss the petition so far as it sought to take another tract. Cross-errors stricken from the record, and judgment reversed.

On September 10, 1903, the Chicago & Milwaukee Electric Railroad Company, the appellant, filed a petition in the county court of Lake county to condemn two tracts of land; one lying in the city of Ft. Sheridan, and the other in the village of North Chicago, both in Lake county. Both tracts belong to the appellee the Chicago & Northwestern Railway Company, hereinafter referred to as the Northwestern Company, which appeared and filed a traverse to the petition, denying the right or authority of the petitioner to condemn either parcel of land, and at the same time filed a motion in writing to dismiss the petition. The other appellees, who are trustees under certain mortgages of the respondent company, joined in the traverse and motion. The cause was set down for hearing upon the traverse and motion, and upon such hearing, evidence being taken in open court, the court held that the petitioner had the right to condemn the strip of land lying in the city of Ft. Sheridan, and, as to that land, overruled the motion to dismiss the petition, and further held that petitioner had no right to condemn the strip of land lying in the village of North Chicago, and, as to that strip, sustained the motion to dismiss the petition. Thereupon the court entered judgment that upon the payment of \$4,500, which had been previously stipulated by the parties

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to be the amount of damages which would be occasioned by the taking of the property, petitioner have the right to enter upon the Ft. Sheridan property. Petitioner thereupon appealed from the judgment dismissing the petition as to the North Chicago property.

The evidence shows that petitioner was incorporated March 20, 1902, under the act in reference to the incorporation of railroads in this state, and is authorized by its charter to locate, construct, maintain, and operate a railroad from the city of Chicago in a northerly direction through the townships of Evanston and New Trier, in Cook county, and through the townships of Deerfield, Shields, Waukegan, and Benton, in Lake county, Ill., to some convenient point on the state line between Illinois and Wisconsin. Prior to the organization of petitioner, the Chicago & Milwaukee Electric Railway Company, organized under the general incorporation act of this state, had constructed, and at the time of the organization of petitioner was operating, an electric railway extending from Church street, in the city of Evanston, through the said townships of Evanston, New Trier, Deerfield, and Shields, to the city of Waukegan. On December 30, 1902, the Chicago & Milwaukee Electric Railway Company conveyed to petitioner all of its railroad property and franchises, and petitioner has ever since owned and operated the road so constructed by the Chicago & Milwaukee Electric Railway Company, and which passed through the city of Ft. Sheridan and the town of North Chicago.

Petitioner, at the time of filing the petition herein, already owned a strip of land 25 feet wide, west of and adjoining the 25 foot strip here involved, over which it was operating the single-track railroad owned by it and hereinabove mentioned; and the additional 25 feet is sought to be taken, as appears from the evidence, in order to lay and operate two tracks, the purpose of petitioner being to have a double track between Chicago and Waukegan. The North Chicago strip is the west half of a strip of land 1,434 feet in length north and south, and 50 feet wide east and west. Twenty-Second street is its northern boundary, and it lies west of and adjoining the right of way of the respondent railroad company. The depot and freight building of the latter company are located on a strip 50 feet wide and 1,600 feet long, which belongs to that company, and which lies on the opposite or east side of its right of way, and the south end of which abuts upon Twenty-Second street, which, running east and west there, crosses the Northwestern right of way. A switch track, referred to as a team track, is located east of the main tracks on the right of way adjoining the strip on the east side. The strip west of the right of way has been owned by the respondent railroad company since 1892, and has always been vacant and unoccupied, except that a switch track leading to certain

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factories in the village crosses it at the north end, which is the track over which a crossing is sought in this proceeding. The evidence of the respondents is to the effect that this entire strip west of the right of way is needed by the Northwestern Company for team tracks; that a great deal of business requiring immediate access to a team track is now carried on by one Arnold, who conducts a coal, lumber, and lime yard on the strip east of the right of way, just north of the passenger station, under a lease from the railroad company, and that other parties are requesting similar locations at this station for similar purposes, so that cars can be loaded and unloaded upon their premises; that these locations are not furnished to such parties in order to derive revenue from rentals, but for the sole purpose of facilitating the business of the railroad company with the public, and the rental is only nominal, being from \$1 to \$5 per year, and that it has long been the practice of this and other railroad companies to furnish such facilities at stations along their lines; that, owing to the growth of business, it had become impossible to furnish such locations with present facilities at North Chicago, and that in September, 1903 (shown by appellant to have been after the filing of the petition herein), the division superintendent had a survey made for a team track on the strip sought to be condemned, in order to furnish locations for such industries along the present team track; that, in addition to the uses aforesaid, the matter of laying two additional tracks between Chicago and Milwaukee is under consideration by the company, which, if carried out, will place an additional track on the east and one on the west of the present main tracks at this station, the one on the east taking the place of the present team track, and that therefore team tracks will have to be placed on the strip west of the right of way, and will take all that strip, including the 25 feet here involved. The petitioner introduced evidence to show that, in case the additional main tracks are laid, there will be abundant space between the east line of the strip it seeks to condemn and the most westerly of the additional tracks for a team track, and for the travel of teams used in loading and unloading cars there. Respondents sought to show that the entire 50-foot strip west of its tracks is needed by it for side and team tracks now or in the immediate future.

The court, as above stated, dismissed the petition as to this tract on the ground that the land was already devoted to a public use, and was not subject to condemnation. Appellant has assigned errors questioning this action of the court, and appellees have assigned cross-errors, and seek to show that the court erred in overruling their motion to dismiss the petition as to the Ft. Sheridan property, and in entering judgment of condemnation.

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Kretzinger, Gallagher, Rooney & Rogers, for appellant.
S. A. Lynde (Lloyd W. Bowers, of counsel), for appellee.

SCOTT, J. (after stating the facts). Appellant moves to strike the cross-errors from the files on the ground that they relate to a judgment entirely separate and distinct from the judgment brought here by appeal. Petitioner sought condemnation of two separate tracts of real estate. Respondents interposed a motion to dismiss the petition as to both. This motion was sustained as to one parcel, and as to that parcel the judgment dismissing is the final judgment from which petitioner appealed. The motion was overruled as to the other tract, and the cause proceeded to a judgment fixing the amount of damages; and appellees, by their assignment of error, attack this latter judgment. We think it, in effect, a judgment separate and distinct from that appealed from. Had the two pieces of property been owned by different persons, it is manifest that those owning the one in reference to which judgment of condemnation was entered could not assign cross-errors questioning that judgment in an appeal by which petitioner brings before this court for review the judgment dismissing the petition as to the real estate of other owners. The fact that both tracts in the present instance belong to the same owner does not render the judgments any the less separate and distinct. The case of *Oliver v. Wilhite*, 201 Ill. 552, 66 N. E. 837, was a chancery proceeding, but we regard the doctrine there announced as applicable here. It was there said (page 564, 201 Ill., page 842, 66 N. E.): "When, however, a decree in chancery is severable—that is, composed of distinct parts having no bearing upon each other—each part may be treated as a distinct decree, and an appeal taken from one part without affecting the others. *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336; *Union Trust Co. v. Trumbull*, 137 Ill. 146, 27 N. E. 24; *Moore v. Williams*, 132 Ill. 591, 24 N. E. 617. And when an appeal from one part of a servable decree is taken, cross-errors cannot be assigned as to parts not appealed from. *Walker v. Pritchard*, supra." The cross-errors will accordingly be stricken from the record.

It is urged that appellant was without power to condemn the strip in North Chicago, as to which the petition was dismissed. This contention is based on the fact that the strip of land which it seeks to take is parallel to the line of road purchased by it from the Chicago & Milwaukee Electric Railway Company. The line so purchased it now owns and operates, and it is said that its attempt to condemn the strip parallel thereto is an indirect violation of section 11 of article 11 of the Constitution of 1870, which forbids any railroad corporation consolidating its stock, property, or franchises with any other railroad corporation owning a parallel or competing line; and it is said that the petition and the resolution of location, and the plats showing the route

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located, offered by petitioner, contemplate on their face the location and building of an independent line of railroad, and, this being true, petitioner cannot exercise the power of eminent domain for the purpose of acquiring a parallel line of railroad to one which it already owns and is operating. So far as the language of the petition is concerned, we think a sufficient answer is that the route of the railroad which petitioner is authorized to construct and operate is defined in its charter and described in the petition, and the petition specifically avers that petitioner has located and proposes to construct that railroad upon the land which it now seeks to condemn. We do not think the laying of another line of road upon the same right of way, where the company building the new line already has one line, is to be deemed the construction of a parallel or competing line, within the language of the Constitution. The right of way now owned by appellant is 25 feet in width. It has the right, under the statute, to condemn a right of way 100 feet in width. The acquirement of a 25-foot right of way does not exhaust its power, but it possesses the right to condemn additional right of way up to the statutory limit (*Chicago, Burlington & Quincy Railroad Co. v. Wilson*, 17 Ill. 123; *Fisher v. Chicago & Springfield Railroad Co.*, 104 Ill. 323); and the fact that it appears that upon this additional 25-foot strip of right of way it proposes to construct a line of railroad in accordance with the terms of its charter, it seems to us, simply means that the additional track is to be operated in conjunction with the existing track as a double-track railroad, and not as a parallel or competing line, within the meaning of the Constitution. The statute contemplates that a railroad company shall have the right to lay as many tracks as it sees fit upon its strip of right of way 100 feet or less in width. As long as its tracks are all laid upon that one right of way, the question of parallel or competing lines does not arise.

It is also urged that the appellant exercised its power to locate the line of its road when it purchased from the railway company a line already located, and that, the power of location having been thus exercised, it is exhausted, and it is without power to locate a line on the additional 25 feet which it now seeks to condemn, and, being without power to locate a line there, it is without power to condemn land for a line which it cannot locate. In support of this position we are referred to the following cases: *People v. Louisville & Nashville Railroad Co.*, 120 Ill. 48, 10 N. E. 657; *Illinois Central Railroad Co. v. People*, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119; *Lake Shore & Michigan Southern Railway Co. v. Baltimore & Ohio & Chicago Railroad Co.*, 149 Ill. 272, 37 N. E. 91; *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 149 Ill. 457, 37 N. E. 78. In each of these cases it will be found that the court had in contemplation

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such a change or relocation as would require the use of an entirely different and distinct right of way. Changing the tracks of a railway from one side to another of a right of way strip 100 feet or less in width is not to be regarded as a relocation. To constitute a relocation, is it necessary that the new line should be projected, in whole or in part, over and upon ground not included within the original right of way or its additions; the whole of that right of way and additions not exceeding 100 feet in width.

It is conceded that a railroad company cannot appropriate or condemn a strip off of the right of way of another railroad company longitudinally, and appellees urge that this 50-foot strip owned by the Northwestern Company west of its tracks, and south of its station at North Chicago, the west 25 feet of which appellant seeks to condemn, is part of its right of way; and it is said that right of way means the land upon which the railroad company has constructed and is operating, or is about to construct and operate, its tracks, whether they be main tracks or side tracks, and is in no wise limited to main tracks; and we are referred to the case of *Chicago and Alton Railroad Co. v. People*, 98 Ill. 350, where it is said (page 357): "We are therefore of the opinion that the land held and in actual use by a railroad company for side tracks, switches, and turnouts must be regarded, within the meaning of the revenue law, as a part of the right of way of the company." We are disposed to the view that the authorities announcing the doctrine that one railroad company cannot condemn, longitudinally, the right of way of another, had reference only to the right of way of the width which the railroad company is authorized by statute to condemn. The two cases particularly relied upon by the appellees (*Illinois Central Railroad Co. v. Chicago, Burlington & Northern Railroad Co.*, 122 Ill. 473, 13 N. E. 140, and *Suburban Railroad Co. v. Metropolitan Elevated Railroad Co.*, 193 Ill. 217, 61 N. E. 1090) are of this character. In the first of these cases, it is true that a part of the right of way protected was 200 feet wide. It will be found, however, that this resulted from a grant made by act of Congress, commonly known as the Illinois Central Railroad Company grant, and the right of way of that width, so possessed by appellant in that case, was regarded by the court as being the subject of the same exemption as applies to the statutory right of way 100 feet in width; and, in the case last above cited, this court pointed out the fact that the purpose of the suit was to deprive the defendant of its right of way, and appropriate it to the use of the petitioner. The contest there was over the right to use the same strip of ground for the main tracks of each company, and the land involved in the contest was evidently within the 100-foot limit.

The statutory right of way acquired through the village of North Chicago by the Northwestern Company is 99 feet in

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width. This 50-foot strip, of which appellant seeks to take a part, adjoins the 99-foot strip, but is no part of it. It is not, therefore, exempt on the theory that it is part of the right of way. If it was within the 99-foot strip, it would be exempt, whether actually needed by the owner for railroad purposes or not, so long as the owner was engaged in the business for which it was chartered. Being outside the 99-foot strip, the question of its exemption depends upon other considerations.

It is said that the ground upon which the court sustained the motion to dismiss the petition in reference to the strip at North Chicago was that such strip is held by the Northwestern Company for its railroad uses and purposes, and is necessary for its present and immediate future uses and purposes, and to enable it to furnish the necessary facilities required in the transaction of its business at that station. This is a question of fact. The evidence for its determination was heard in open court by the judge of the county court, and it is urged that his finding is entitled to the same weight as would be attached to the verdict of a jury on a question of fact where the trial court had refused to set such verdict aside, but had entered a judgment in accordance therewith. The question here was, is the strip sought to be taken necessary for the present or immediate future uses of the Northwestern Company in connection with the business of operating its railroad? We deem the affirmative finding of the county court against the manifest weight of the evidence. The 50-foot strip, of which petitioner proposes to take a part, has never been occupied by the Northwestern Company for any purpose except that a switch track crosses one end of it. On the east side of its right of way at the village of North Chicago, the Northwestern Company owns a strip of ground 50 feet in width and 1,600 feet long immediately adjoining its right of way, upon which is located its passenger station. On the right of way between the station and the main tracks is a team track, so designated from the fact that it is used to place freight cars where they may be loaded from, or unloaded upon, wagons. It appears that room on this track is abundant for the purposes of the Northwestern Company at present. Twenty-five cars can stand on that team track at one time, and the evidence is that at the time of the trial the Northwestern Company was handling only from 12 to 15 car loads a week on that track, and its business had been increasing there for several years prior to that time. After the filing of the petition herein, the division superintendent of the Northwestern Company, without knowledge, as he says, that the petition had been filed, or that appellant was seeking to condemn the 25-foot strip in controversy, had a survey made for the purpose of locating another team track on this strip west of the right of way. His purpose was to have a track laid there to use as a team

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track, so that the Northwestern Company could lease ground in the strip owned by it east of its right of way and along its present team track to persons who now desire to establish thereon coal yards, lumber yards, flour and feed stores, and other business of like character, where freight can be unloaded directly into or upon the place where it is to be stored prior to sale without hauling by wagon. It also appeared that the Northwestern Company is contemplating the construction of two additional main tracks upon that part of its right of way which passes through North Chicago, one to be on each side of the two main tracks now occupying the right of way. The one on the east side would then occupy the space now occupied by the present team track, and it is urged on the part of the Northwestern Company, for reasons unnecessary to repeat here, that it would not then be feasible to construct a team track upon the ground now owned by it on the east side of the right of way, and that the only other place at which such team track would be constructed would be on this 50-foot strip on the west side of the right of way, and that, if 25 feet be taken by appellant by condemnation, sufficient ground will not be left on which to construct the new team track. The distance between the west rail of the present main track of the Northwestern Railroad Company, where it passes this property, and the west line of this 50-foot strip, is $91\frac{1}{2}$ feet. Deducting 25 feet for the strip which petitioner proposes to take, and 13 feet, which is said to be the proper space to allow for an additional main track on the west side of the present main tracks—an aggregate of 38 feet—and there is left $53\frac{1}{2}$ feet. The only conclusion that can be drawn from the evidence is that this is abundant space upon which to construct and use one team track, and if the team track on this ground is constructed for the purpose of enabling the Northwestern Company to lease to its patrons ground along its present team track, and the proposed additional main tracks should not be constructed, the space for the new team track would be 13 feet greater.

It is contended by the Northwestern Company that this space, especially if the additional main tracks be constructed, will be insufficient, and in this respect great reliance is placed upon the testimony of Edward C. Carter, its engineer, from whose testimony the following is quoted by counsel for appellees: "My judgment would be that the land which petitioner seeks to condemn would unquestionably be necessary in case of the construction of the four main tracks. I base that judgment on the construction the last six years of something like 300 miles of second track for the Northwestern Road, where at almost every station we were compelled to secure some additional property in order to provide the facilities that were required, whenever it was possible for us to secure it. Many times we were obliged to go to considerable additional expense in order to complete the additional track on the right of way that we had, and which we could

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not add to." This is too indefinite. Besides, this testimony is based upon the necessity of constructing two team tracks west of the most westerly of the two new main tracks, with a paved teamway between—an arrangement which seems unnecessarily elaborate for a village which, according to the evidence, had a population of but 1,150 at the last census, and in which but 12 or 15 cars per week are loaded upon, or unloaded from, the team track. A team track constructed west of the right of way could be approximately 1,200 feet in length. There is nothing whatever in this record to indicate that the Northwestern Company will at any time in the near future need greater accommodations on a team track at that station than would be afforded by one of that length. It certainly appears that greater length will not be required unless its business requiring such facilities there should multiply many times, and no probability of such a condition of affairs arising soon is shown by the evidence. The testimony shows that, with but one team track laid on the 53½-foot strip, there would be abundant space left for the use of teams in loading and unloading—a greater space than the Northwestern Company has reserved for that purpose, in connection with any one team track, in its yards at Chicago, Highland Park, Lake Forest, or Waukegan. It is possible, it is true, that the Northwestern Company may, at some remote time in the future, need for public use the 25-foot strip which petitioner seeks to condemn, or a like space elsewhere at that station. It is evident that it does not need it now, and will not need it in the immediate future. Petitioner needs it now for a present public purpose, for which it has the power to acquire a right of way by condemnation. The remote and uncertain needs of the Northwestern Company must yield to the present and certain right of appellant.

Appellant also argues that its right to condemn this strip cannot be defeated by showing that the Northwestern Company needs it for the purpose of constructing thereon a team track in order that it may lease the land contiguous to its present team track to patrons who may desire to carry on a business there, where they may have ready access to the switch, and also contends that, as it desires this strip for its main track, while the Northwestern Company seeks to use it merely for a side track of the kind under discussion, the use to which appellant proposes to devote the land is of a higher character than that to which the Northwestern Company desires to appropriate it, and that appellant therefore has the right to condemn it, even if it was necessary for the uses of the Northwestern Company for team-track purposes. We find it unnecessary to consider either of these questions.

The judgment of the county court appealed from will be reversed, and the cause remanded to that court for further proceedings in conformity with the views herein expressed. Reversed and remanded.

CARTWRIGHT, J., dissents.

HAMPEL *v.* DETROIT, G. R. & W. RY. CO.

(Supreme Court of Michigan, Oct. 18, 1904.)

[100 N. W. Rep. 1002.]

**Railroads—Crossings—Injuries to Travelers—Drivers of Vehicles—
Infants—Imputed Negligence.***

Where an infant not quite 14 years of age was killed in a collision at a railroad crossing, the negligence of the driver of a team, with whom deceased was riding at his invitation, was not imputable to her, so as to preclude a recovery against the railroad company for her death.

Error to Circuit Court, Mecosta County; Lewis G. Palmer, Judge.

Action by Julius Hampel, as administrator of the estate of Amelia Drager, deceased, against the Detroit, Grand Rapids & Western Railway Company. From a judgment in favor of defendant, plaintiff brings error. Reversed.

Joseph Barton and Walter W. Drew, for appellant.

Frederick W. Stevens (Charles McPherson, of counsel), for appellee.

HOOKER, J. August 23, 1899, Amelia Drager, who would have been 14 years old, had she lived until the 3d day of the following October, was killed by one of defendant's trains at a highway crossing. In December, 1901, this suit was commenced. No witnesses were sworn on the part of the defendant. After all the witnesses were sworn on the part of the plaintiff, the circuit judge directed a verdict in favor of defendant. The case is brought here by writ of error.

The accident occurred near Baghold's mill, which stands about 75 feet north of the highway, and 40 feet east of the railway track. At this point the railway track runs north and south, and the highway east and west. On the south of the highway, and west of the track, was a large pile of wood, partly on the railroad right of way and partly in the highway. It was 6 to 8 feet high, and obscured the view of the train coming from the south when one was traveling the highway from the west, though one could see the smoke from an approaching locomotive. The girl and her sister lived a half mile west of the crossing. Nine months in the year she attended school. To reach the schoolhouse, she crossed the railroad track. The school building was east of the track. Upon the day of the accident she and her sister were going east from home, carrying a bundle. John Fenning, who was driving a single horse before a buggy, overtook them, and invited them to ride. They accepted the invitation. The

*For the authorities on the subject of imputable negligence, see foot-note appended to *Duval v. Atlantic Coast Line R. Co.* (N. Car.), 11 R. R. R. 235, 34 Am. & Eng. R. Cas., N. S., 235; foot-note appended to *Carney v. Concord St. Ry.* (N. H.), 11 R. R. R. 307, 34 Am. & Eng. R. Cas., N. S., 307, where all the preceding authorities in this series are referred to.

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record discloses that, just before getting to the wood pile, Fenning looked for a train, and, seeing none, continued to travel toward the crossing; paying no further attention to the railroad, or to the trains that might be approaching. This was doubtless because, as he expressed it, he did not know any train was due. When the horse got within a few feet of the track, a train appeared, the horse turned to the left and reared, and the wheel of the buggy struck a log which projected into the highway about four feet. The inmates of the buggy were thrown toward the train, and Miss Drager was killed. It is claimed no signals were given for the crossing. The testimony of the witnesses for the plaintiff is contradictory upon that point, one of them swearing she heard the whistle; and, were it not for other questions in the case, the testimony as to whether the signals were given should have been submitted to the jury as a question of fact. An important question in the case is whether Mr. Fenning was negligent in approaching the crossing as he did. It would not profit any one to set out the testimony in detail, but the proof is overwhelming that he was so negligent, that, if he was suing for damages, it would have been the duty of the judge to direct a verdict in favor of the defendant. See *Railroad Company v. Miller*, 25 Mich. 274, and notes, and the many cases cited there. *Freeman et al. v. Railway Co.*, 74 Mich. 86, 41 N. W. 872, 3 L. R. A. 594; *Grostick v. Railroad Co.*, 90 Mich. 594, 51 N. W. 667; *Gardner v. Railroad Co.*, 97 Mich. 240, 56 N. W. 603, and the cases there cited; *Stewart v. Railroad Co.*, 119 Mich. 91, 77 N. W. 643; *Britton v. Railroad Co.*, 122 Mich. 359, 81 N. W. 253.

The next question of importance is whether the negligence of the driver is imputable to the plaintiff's intestate. Plaintiff's counsel concede that, had she been an adult, it would be, but earnestly and ably contend that, as she was an infant, she should not be charged with the negligence of the driver. It is urged that the doctrine of negligence rests upon the assumption that the relation of principal and agent or master and servant exists between the passenger and driver, and that, as an infant can be neither principal nor master, the doctrine cannot apply to an infant. The deceased was an infant 13 years old, in a carriage by invitation of its driver, through whose negligence, and without her fault, she was killed. Had she been an adult, his negligence would have been imputable to her, upon the fiction that he was her agent, under the doctrine of *Thorogood v. Bryan*, 8 C. B. 114, which is recognized as authority in this state. See *Mullen v. Owosso*, 100 Mich. 103, 58 N. W. 663, 23 L. R. A. 693, 43 Am. St. Rep. 436. But this infant lacked the capacity to make him her agent, while there is not the least substance of a claim that either party supposed that such relation existed as a matter of fact. It is said that the case is covered by *Apsey v. R. R. Co.*, 83 Mich. 432, 440, 47 N.

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W. 319, 513. The question of imputed negligence is not discussed in that case. It may be inferred that it was not raised. The decision in *Mullen v. Owosso* was carefully limited to cases of adults, by the writer of the opinion, who participated in the decision of the *Apsey Case*. In some jurisdictions the negligence of parents is imputable to children. Whatever the rule in this state may be as to children of very tender years, having no capacity to care for themselves, that doctrine is not sustained as to infants generally. See *Fye v. Chapin*, 121 Mich. 679, 80 N. W. 797, citing *Shipy v. Au Sable*, 85 Mich. 280, 48 N. W. 584, and *Mullen v. Owosso*, 100 Mich. 103, 58 N. W. 663, 23 L. R. A. 693, 43 Am. St. Rep. 436. Here no question of the parents' negligence is raised, as in the *Apsey Case*; but, if a child is chargeable with its parents' negligence, does it follow that he should be held responsible for that of strangers at whose invitation he rides? The doctrine is at variance with the overwhelming weight of authority here and in England. If the case of *Apsey v. R. R. Co.*, *supra*, must be considered and authority for the proposition that the negligence of a driver is imputable to an infant, it should be overruled.

It is said the defendant was guilty of gross negligence, and the question of contributory negligence becomes immaterial. There is nothing in the record to indicate the case comes within the holdings of this court as to what constituted gross negligence. See *Schindler v. Railway Co.*, 87 Mich. 411, 49 N. W. 670; *Buckley v. Railroad Co.*, 119 Mich. 583, 78 N. W. 655; *Labarge v. Railroad Co.* (Mich.) 95 N. W. 1073.

Judgment is reversed, and a new trial ordered.

GRANT, J., did not sit. The other Justices concurred.

LOUISVILLE & N. R. CO. v. BRYANT.

(Supreme Court of Alabama, July 21, 1904.)

[37 So. Rep. 370.]

Railroads—Injuries at Crossings—Contributory Negligence—Obstructing View—Duty to Look—Accident.*

Where plaintiff, while driving on a highway, approached a public railroad crossing, covering about fifty feet, and occupied by four or five tracks, at a time when the view of the main track was obstructed by cars on other tracks, and plaintiff testified that he listened before going on the crossing, and heard no sound of the train, except that made by a switch engine, and there was evidence that the bell of the passenger train, by which plaintiff was struck, which approached on the main

*As to the care required of a highway traveler when about to cross railroad tracks, see foot-note appended to *Stoy v. Louisville, etc., R. Co.* (Ind.), 11 R. R. R. 824, 34 Am. & Eng. R. Cas., N. S., 824; *Sulder v. Pennsylvania R. Co.* (N. J.), 11 R. R. R. 823, 34 Am. & Eng. R. Cas., N. S., 823; *Baltimore & O. R. Co. v. McClellan* (Ohio), 11 R. R. R. 800, 34 Am. & Eng. R. Cas., N. S., 800; *Fleschhut v. Lehigh Valley R. Co.* (Pa.), 11 R. R. R. 755, 34 Am. & Eng. R. Cas., N. S., 755.

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track, was not ringing, and that no other signal was given before it reached the crossing, plaintiff was not guilty of contributory negligence, as a matter of law, in failing to alight from his buggy, and go to a point sufficiently near the track to enable him to see beyond the point where his vision was obstructed by the cars.

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

Action by Jerry Bryant against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Chas. P. Jones and W. F. Thetford, Jr., for appellant.

Willis Brewer, Jr., Hill, Hill & Whiting, and Thos. W. Martin, for appellee.

TYSON, J. This action is for the recovery of damages suffered by plaintiff occasioned by one of defendant's passenger trains striking his horse and buggy, which he was at the time driving, at a public crossing near the city of Montgomery. This crossing was across four or five tracks, which occupied a space of about fifty feet. The evidence tended to show that when plaintiff drove up to this crossing, it was obstructed by a switch engine, to which was attached some cars. This engine and cars were on the third track from him, and he stopped and waited about five minutes for them to clear the crossing. When this train cleared the crossing, it went south about fifty or sixty feet, being in the direction from which the passenger train came that struck plaintiff's horse, where it stopped. There was also on the track nearest to him, in the same direction, some cars. The second track was unoccupied. These cars and the switch engine obstructed plaintiff's view of the fourth or main track beyond a point of some fifty or sixty feet, upon which the passenger train was being operated. The distance between the third and fourth tracks was about five feet. Plaintiff testified that he listened before going upon the crossing, and heard no sound of a train, except that made by the switch engine. There was also testimony tending to show that the bell of the passenger train was not ringing, and that no other signal was given before reaching the crossing.

As the only assignment of error insisted upon was the refusal of the general affirmative charge, with hypothesis, requested by defendant, we have stated the tendencies of the evidence most favorable to plaintiff's side of the controversy. The insistence seems to be that this charge should have been given, because the evidence shows that plaintiff was guilty of contributory negligence in attempting to cross the fourth track. Unless it can be affirmed, as matter of law, that it was his duty to alight from his buggy, and go to a point near enough to this track so as to look along and down it beyond the point where his vision was obstructed by the switch engine and the cars, the charge was properly refused. This

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question was fully considered in the case of *Georgia Pacific Railway Co. v. Lee*, 92 Ala. 262, 9 South. 230, upon a state of facts very similar to the one shown by this record, and it was there held that it was for the jury to determine, under all the circumstances, whether the driver (plaintiff here) was negligent in not looking up and down the main track before attempting to cross it. Indeed there is no substantial difference between the facts of the two cases, and the opinion in that case is conclusive of the question presented here. See, also, *Kansas City M. & B. R. R. Co. v. Weeks*, 135 Ala. 620, 621, 34 South. 16; *Mackay v. N. Y. Central R. R. Co.*, 35 N. Y. 75.

Affirmed.

GLASSEY *v.* WORCESTER CONSOLIDATED ST. RY. CO.
(two cases).

(Supreme Judicial Court of Massachusetts, Worcester, March 31, 1904.)

[70 N. E. Rep. 199.]

Negligence—Proximate Cause.*

Where a street railway company left a reel which had held feed wire lying on its side in the untraveled portion of a highway, and some boys rolled it down the street, striking plaintiff's carriage and injuring her, the negligence, if any, of the company in leaving the reel in the highway, was too remote to entitle plaintiff to recover.

Exceptions from Superior Court, Worcester County; Maynard, Judge.

Separate actions by Rachel Glassey and Andrew J. Glassey against the Worcester Consolidated Street Railway Company. Judgments for defendant in both cases, and plaintiffs except. Exceptions overruled.

A. D. Rugg and Charles W. Saunders, for plaintiffs.

Charles C. Milton and Chandler Bullock, for defendant.

MORTON, J. These two cases were tried and have been argued together. At the close of the plaintiffs' evidence in the superior court, the presiding justice ruled, at the defendant's request, that the plaintiffs could not recover, and directed verdicts for the defendant. The cases are here on exceptions by the plaintiffs to these rulings. The case of the plaintiff Rachel, who is a married woman, is for injuries alleged to have been received by her in consequence of the negligence of the defendant in leaving a large reel by the side of or in Cameron street, in Clinton, which some boys rolled down the street, and which struck the carriage in which the plaintiff was driving, and threw her out, and caused the

*See generally, foot-note appended to *Haley v. St. Louis Transit Co. (Mo.)*, 12 R. R. R. 142, 35 Am. & Eng. R. Cas., N. S., 142, where all the authorities in this series on the subject of what is the proximate cause are collected.

injuries complained of. The other action is by the husband for the loss of consortium and the expenses incurred by him by reason of the injuries to his wife.

The evidence would have warranted a finding, and, for the purposes of these cases, we assume that such was the fact, that the reel belonged to the defendant, and had had feed wire upon it, which had been strung upon its poles by persons in its employ. But it is not clear whether the reel was left on a vacant piece of land just outside the limits of the highway, or whether it was left within the limits of the highway. We assume, as most favorable to the plaintiffs, that it was left within the limits of the highway. The uncontradicted testimony shows, however, that it was left outside the traveled portion of the highway, lying on its side in the grass in a secure position. The plaintiffs introduced in evidence a by-law of the town forbidding persons to leave obstructions of any kind in the highway without a written license from the road commissioners or other board having charge of the streets, and they contend that, if the reel was left within the location of the highway, when forbidden by the by-law, that of itself constituted such negligence as renders the defendant liable. But the most, we think, that can be said of this contention, is that the leaving of the reel within the limits of the highway was evidence of negligence, not that in and of itself it rendered the defendant liable, or should be held, as matter of law, to have contributed directly to the accident. *Hanlon v. South Boston R. Co.*, 129 Mass. 310. The question is whether, in leaving the reel lying on its side in the grass, near the road, the defendant ought reasonably to have anticipated that children passing along the street on their way to school, or for other purposes, would take it from the place where it had been left, and engage in rolling it up and doing the street, and that travelers on the highway would thereby be injured. The question is not whether a high degree of caution ought to have led the defendant to anticipate that such a thing might possibly occur, but whether it ought reasonably to have been expected to happen in the ordinary course of events. In the former case the defendant would not be liable, and in the latter it might be held liable, notwithstanding an active human agency had intervened between the original wrongful act and the injury. The case of *Stone v. B. & A. R. Co.*, 171 Mass. 543, 51 N. E. 1, 41 L. R. A. 794, furnishes an illustration of the former class of cases, and the case of *Lane v. Atlantic Works*, 111 Mass. 136, of the latter. It is clear that the plaintiff Rachel was in the exercise of due care. But assuming that the reel was left in the highway, and that that was some evidence of negligence, we think that such negligence was the remote, and not the direct and proximate, cause of the plaintiff Rachel's injury. The material facts, with the inferences to be drawn from them, are not in dispute, and in such a case the question of remote or prox-

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mate cause is one of law for the court. *Stone v. B. & A. R. Co.*, 171 Mass. 543, 51 N. E. 1, 41 L. R. A. 794; *McDonald v. Snelling*, 14 Allen, 290, 299, 92 Am. Dec. 768; *Hobbs v. London Southwestern R. Co.*, L. R. (1875) 10 Q. B. 111-122. The defendant's servants left the reel in a secure position, lying on its side in the grass, outside the traveled part of the street, and not in immediate proximity of it. As the reel was left, it was entirely safe. It was not possible for a slight or accidental movement to set it in motion so as to injure others, as in the case of *Lane v. Atlantic Works*, supra. The reel was large and cumbersome, and required active effort on the part of a number of children to move it from the place where it had been left onto the traveled part of the highway, and set it in motion. And in order to injure the plaintiff or any other traveler on the highway, it was necessary that it should be set in motion at a time when the plaintiff or other travelers were passing along the highway. In other words, in order to render the defendant liable, it must appear not only that it should have anticipated that, in the ordinary course of events, school children would take the reel from the position where it had been securely left, outside the traveled part of the road, but that they would set it in motion on the highway under such circumstances that it was liable to injure a traveler thereon. It seems to us that, conceding that there was evidence of negligence on the part of the defendant in leaving the reel where its servants did, they could not be required to anticipate that this would happen in the ordinary course of events, and therefore that the negligence was too remote. See *Speaks v. Hughes* (1904) 1 K. B. 138.

Exceptions overruled.

ILLINOIS CENT. R. CO. v. MCINTOSH.

(Court of Appeals of Kentucky, May 5, 1904.)

[80 S. W. Rep. 496.]

Appeal—Continuance—Surprise—Presumption.

It will be presumed on appeal that it was proper to refuse defendant a continuance sought on the ground of surprise, in that in ruling on a demurrer to the petition the court had indicated a different ground of liability from that on which it proposed to submit the case to the jury, where there is nothing in the record to show defendant was misled by the ruling on the demurrer.

Accident at Crossing—Injury to Sectionman on Hand Car—Signals—Application of Statute.*

Ky. St. 1903, §§ 786, 466, requiring locomotives to sound a whistle and ring a bell on approaching highway crossings, and authorizing a recovery of damages by persons injured by a failure to do so, protect

*As to whether it is negligence to fail to give crossing signals where the accident was not at crossing, see foot-note appended to *Mitchell v. Union Terminal Ry. Co.* (Iowa), 10 R. R. R. 75, 33 Am. & Eng. R. Cas., N. S., 75, where all the preceding authorities in this series are collected or referred to.

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sectionmen on a hand car near a highway crossing which a locomotive is approaching.

Injury to Sectionman on Hand Car—Collision—Assumption of Risk.

A sectionman does not assume the risk of a collision of his hand car with a train, induced by the foreman's going forward from a station on the train's time, instead of waiting there for it to pass.

Same—Contributory Negligence—Question for Jury.

Evidence in an action by a sectionman for injuries in removing a hand car from the track to avoid a collision with a train *held* to require submitting the question of contributory negligence to the jury.

Same—Proximate Cause.†

Also to require submitting to the jury the question of whether the injury was the proximate result of the foreman's negligence in running on the train's time.

Same—Gross Negligence—Question for Jury.

Also to require submitting to the jury the question of the foreman's gross negligence in running on the train's time.

Instruction—Waiver of Defects.

Where a defendant understands from the court's ruling on a demurrer to the petition that its liability is rested solely on a certain ground, its introduction of evidence will not be deemed a waiver of defects in alleging another ground of liability.

Injury to Sectionman on Hand Car—Threatened Collision—Strain in Removing Hand Car—Proximate Cause—Pleading.

In a sectionman's action for injuries in removing a hand car from the track to avoid a collision with a train in the neighborhood of a highway crossing, plaintiff alleged negligence, in that the train was being run in a rapid, reckless, and dangerous manner, and "without giving proper signals:" *held* insufficient to warrant an instruction that if the train approached the crossing without whistling or ringing the bell, whereby the hand car was led into dangerous proximity to the train, etc., such failure was the proximate cause of plaintiff's injury.

Same—Same—Same—Failure to Give Crossing Signals—Negligence of Section Foreman—Proximate Cause.†

A train's failure to give the statutory signals on its approach to a highway crossing is not the proximate cause of injuries to a sectionman in removing a loaded hand car from the track to avoid a collision, where the presence of the hand car in the neighborhood was due to the section foreman's negligence in running on the train's time.

Appeal from Circuit Court, Hopkins County.

"To be officially reported."

Action by Charles McIntosh against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Gordon, Gordon & Cox, Pirtle & Trabue, and J. M. Dickinson, for appellant.

Fox & Morrow and C. J. Waddill, for appellee.

HOBSON, J. Appellee, Charles McIntosh, was in the service of appellant as a laborer in a section gang working under a foreman named Monroe Ray, who had charge of the force. On or about November 7, 1901, they were working above Ilsey, a station on the road. After dinner the fore-

†For all the preceding authorities in this series on the subject of what constitutes the proximate cause, see foot-note appended to *Haley v. St. Louis Transit Co. (Mo.)*, 12 R. R. R. 142, 35 Am. & Eng. R. Cas., N. S., 142.

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man ordered the men to put the hand car on the track, saying they had to go to Ilsey. They went down to Bostown, and there stopped a minute or two while he went into a store. When he came out of the store and got on the car, he directed them to pull out. This they did, and when they had gone a short distance, as they rounded a curve, they saw a freight train approaching them, about 75 or 100 yards off. They all jumped from the car. The foreman ordered the car to be taken off the track. There are four handholds on the car, for four men to take hold of it. Appellee and three other men took hold of the car, as ordered by the foreman, and quickly got it off the track as the engine came right beside them. The car had on it two or three jacks, twelve or fifteen tamping picks, about the same number of shovels, two or three claw bars, two or three line bars, dinner buckets, and other things. The usual way of moving the hand car from the track was to unload it, and then take the car off, but on this occasion they had to take the car off with the load on it, to prevent collision with the train, and hardly had time to get it off in that way. They also had to lift it up very hurriedly, and move off with it quickly, to avoid the collision. In doing this, appellee, McIntosh, was badly ruptured, and his capacity to labor was seriously impaired. He also suffered pain and lost time while suffering from the injury. The train was on time, and the section foreman was running on the time of the train. There was a public road crossing a few rods west of them, over which the train passed as it approached them; and it failed to whistle or give the statutory signal for the road crossing, by reason of which its presence was unknown to the men on the hand car until they rounded the curve and were very near it. McIntosh filed suit to recover for his injuries, alleging negligence on the part of the section foreman and also on the part of the trainmen. The proof introduced on the trial by him tended to show the facts above stated. The evidence for the defendant tended to show that his injuries were not as serious as claimed by him, and that the proper signals were given for the crossing by the engineer as the train approached it. The jury found for the plaintiff in the sum of \$650.

At the conclusion of the plaintiff's evidence the defendant moved the court to instruct the jury peremptorily to find for it. The court overruled the motion; holding that the sole ground upon which he would submit the issue was as to whether or not "it was negligence for the freight train to approach the public crossing at the same time the sectionmen did, without giving the statutory warning." The defendant then announced that it was surprised, and was unprepared to meet the case on these views, and moved the court to set aside the swearing of the jury and grant it a continuance, which motion the court overruled. The ground of this motion, as we are informed in the brief, was that, in over-

ruling the demurrer to the petition filed by the defendant, the court had held the petition good, on the ground of the negligence charged in the part of the section boss, and the defendant had prepared its case only on this ground. But there is nothing in the record showing that the court had misled the defendant in any way in its ruling on the demurrer at the previous term, and, in the absence of evidence, we must presume that he ruled correctly in overruling the motion to set aside the swearing of the jury or continue the case. The defendant made no showing that any proof could be had if the case was continued which it did not then have, and no affidavit was filed to show that the ends of justice required a continuance of the case.

At the conclusion of the evidence the court refused the following instruction asked by the plaintiff: "The court instructs the jury that if they believe from the evidence that the section boss, Monroe Ray, by gross negligence ordered the hand car to be run from the place of work, near Boxtown, to Ilsey, without proper precaution to protect his crew from collision with trains, and if they further believe from the evidence that Charles McIntosh was with said crew, and that he was injured in a reasonable effort to remove said car from the track to prevent a collision with a train, and they further believe from the evidence that said injury was the natural result of the said gross negligence, then the jury will find their verdict for plaintiff. 'Gross negligence,' as here used, means the absence of slight care." He then gave the following instruction, to which the defendant objected: "The court instructs the jury that if they believe from the evidence that the engine mentioned by the witnesses approached a public road crossing near where plaintiff claims to have been injured without sounding its whistle or ringing its bell, and that, by reason of a failure of the defendant's employees in charge of said engine to either ring the bell or blow the whistle while approaching said crossing, a hand car, and sectionhands on same, ran into dangerous proximity to the approaching train, which rendered it necessary for plaintiff and others to speedily remove said car from the track, and that plaintiff, in assisting to remove said car from the track, and while exercising ordinary care for his own safety, was injured in his person, or ruptured, and that such injury was the direct and proximate result of such failure by those in charge of the engine to blow the whistle or ring the bell on approaching the crossing, then the law is for the plaintiff, and the jury will so find."

It is insisted for appellant that, as to a sectionhand on a hand car, the failure of the train to whistle at a public crossing as required by the statute is not negligence; that a sectionhand assumes the risk incidental to riding on hand cars, including the risk of being overtaken by a train; that the peril of throwing off the hand car was one of the ordinary

risks of the service which was assumed by the plaintiff; and that the hernia suffered by him was not the natural or proximate result of the negligence of the defendant. It is also insisted that the instruction given by the court is not warranted by the allegations of the petition.

Section 786, Ky. St. 1903, requires that each locomotive shall have a bell and whistle, and that outside of incorporated towns the bell shall be rung or whistle sounded for a distance of at least 50 rods from the place where the railroad crosses at grade any public highway, and that the bell shall be rung or whistle sounded continuously until the engine has reached such highway crossing. Section 793 provides a penalty for a violation of the statute, and, by section 466, a person injured by violation of the statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty for the violation is thereby imposed. In *Cahill v. Cincinnati, etc., R. R.*, 92 Ky. 345, 18 S. W. 2, it was held that the failure of a railroad train to give the signal of its approach to a public crossing is negligence, as to one at a private crossing near by, and thus lawfully upon the track. This case has been followed in the subsequent cases, and the principle thus decided seems to apply equally to persons on a hand car, rightfully using the track, as to one on a private crossing. *L. & N. R. R. Co. v. Survant*, 44 S. W. 88, 19 Ky. Law Rep. 1576; *L. & N. R. R. v. Bodine*, 59 S. W. 740, 23 Ky. Law Rep. 147; *Wilmuth's Adm'r v. I. C. R. R.*, 76 S. W. 193, 25 Ky. Law Rep. 671.

A sectionhand assumes the risks incidental to riding on a hand car where ordinary care is used in its management, but he does not assume the risk incidental to the gross negligence of the section foreman in running the hand car. It is the duty of the section foreman not to expose his men to risks of collisions with trains, thus imperiling their lives, without exercising proper precautions for their safety. In the case before us he was running on the time of the freight train. He stopped at Boxtown, and, without taking any precautions for the safety of his men, instead of waiting there for the train to pass, went on until he met the train. Such conduct warranted the jury in finding him guilty of gross negligence, and, while the sectionmen assume all risks incidental to ordinary negligence on his part, the company is liable for his gross negligence. *L. & N. R. R. v. Collins*, 63 Ky. 114, 87 Am. Dec. 486; *Illinois Cent. R. R. v. Coleman*, 59 S. W. 13, 22 Ky. Law Rep. 878; *Cincinnati, etc., R. R. v. Cook's Adm'r*, 113 Ky. 162, 67 S. W. 382.

In *Long's Adm'r v. Illinois Central Railroad*, 68 S. W. 1095, 24 Ky. Law Rep. 567, 58 L. R. A. 237, it was held that where the section foreman ordered his men to proceed with the hand car, and one of them was killed in a collision by reason of his negligence, there could be a recovery, although he knew they were running upon the time of the train. The

court said: "The section foreman under whose direction he worked represented the master, and it was Long's duty to obey his orders in the usual course of business. When he received an order, it was not his duty to sit in judgment upon its propriety, or to enter into a discussion with him as to the facts upon which it was based. He had a right to presume that improper orders would not be given, and to assume that the section foreman would not direct him to take risks that were improper. If he was injured while obeying the orders of his superior, and by reason of his negligence, he may recover, unless the risk was such that a person of ordinary prudence, situated as Long was, would not have taken it." The court adheres to the rule thus laid down. In that case Long was killed, and there might be a recovery under the statute for his death if only ordinary negligence was shown. But in this case, as death did not result, and the common-law rule declared by the court has not been changed by statute in cases where death does not result, there can be no recovery on account of the negligence of the section boss in operating the hand car unless gross negligence is found. The ordinary way of taking the hand car from the track was to unload it and then lift it off. In the case at bar, by reason of the proximity of the train, there was no time to unload the hand car; and, when the section boss gave the order to take it off the track, it was, under the circumstances, an order to take it off as it was, without unloading it, and to take it off quick, before the train reached it. It is a matter of common knowledge that hernia is liable to be produced by a sudden, violent strain; and the removal of the hand car, loaded as it was, quickly from the track, would naturally cause such a strain, especially as there were only four handholds on the car for four men to lift it. The emergency requiring this strain which brought about the injury to appellee was due to the negligence of the foreman, as well as to the want of signals of the approach of the train. In *I. C. R. v. Langan*, 76 S. W. 32, 25 Ky. Law Rep. 500, it was held that it is the duty of the railroad company to furnish its employees engaged in handling heavy weights adequate assistance to enable them to handle the weight with safety. In view of the emergency that was presented, and the consequences that might have ensued to the train, and to themselves from a collision by the train with the hand car, it was a question for the jury whether appellee exercised such care as might be ordinarily expected of a person of usual prudence, situated as he was, and whether the injury that resulted to him in obeying the order of his superior was the natural and proximate result of the negligence of the defendant above referred to. The order of the boss was in effect an order to each of the men to remove the hand car from the track, and it was the duty of each of them, not to wait for another, but to seize the handhold nearest to him, and obey the order, to avoid a

collision. The circuit court erred in not submitting to the jury the question of gross negligence on the part of the section boss, as above defined.

It remains to determine whether the allegations of the petition are sufficient to warrant the instruction given by the court as to negligence on the part of the trainmen. In the original petition the plaintiff alleged that his injury was proximately caused by the gross negligence of the defendant's section boss in the operation of the hand car, and by the gross negligence of the trainmen in the operation of the engine and train approaching them. The defendant entered a motion that he make his petition more specific, and, this being sustained, he filed an amendment; alleging, as to the train, that it was at the time being run in a rapid, reckless, negligent, and dangerous manner, and without giving proper signals. The defendant filed a general demurrer to the petition, which was overruled, and, without further motion, filed an answer controverting its allegations. On the trial, without objection, proof was given by the plaintiff as to the location of the crossing, and as to whether or not the train gave the statutory signals as it approached it. The rule in this court is that where a matter is defectively alleged, and evidence is given on it by both the parties, without objection, on the trial, the court will treat the defective averment as cured by the proof. We would apply this principle here, but for the motion and statement made by the defendant at the close of the plaintiff's evidence, which shows that it did not understand that the case was rested on this ground, and was, in effect, an objection to the evidence. The allegation that the train was run without proper signals was a mere conclusion of law. A denial of it raised no issue of fact to be determined. Appellee cannot complain of the speed of the train. The petition should have charged that the crossing was a public one, sufficiently near by for the signals there to have apprised the men on the hand car of the approach of the train in time to have avoided the disaster, and should have stated facts showing that the statutory requirement as to signals was not complied with. In the condition of the pleadings, instruction 1 should not have been given. There is another objection to this instruction. The failure of the trainmen to whistle at the crossing was not the proximate cause of the plaintiff's injury, although it was a link in the chain of circumstances causing it. If the foreman had not run his hand car negligently on the time of the train, there would have been no trouble from the failure to give signals of the approach of the train to the crossing. On the other hand, if these signals had been given, the consequences of his negligence might, perhaps, have been avoided. If the train had struck the hand car and injured the plaintiff from either of these causes, he would have a right of action, or if, in jumping out of the way, he had ruptured himself, when

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placed in peril either by the gross negligence of his foreman, or by the negligence of the trainmen in not giving the signal, he might recover. But in the case at bar he got off the hand car after it was stopped, and, if nothing more had occurred, he would not have been injured. His injury was due, as one of his witnesses expressing it, to the fact that they had to throw the hand car right off, and just had time to get out of the way when the train dashed by. This was done at the order of the section boss, given after the train had passed the crossing, and it would seem that the rupture of the plaintiff might not have occurred but for the car's being loaded. The order of the section boss for them to throw the car off was proper, to avoid a collision; but if, by reason of the emergency thus negligently produced, the plaintiff was injured in obeying the order of the section boss, to prevent a collision or loss of life or property, and his injury was the proximate result of his obeying the order of his boss, and was not due to negligence on his part in overstraining himself to get the car off, of which the jury are to judge, he may recover.

On the return of the case to the circuit court, the plaintiff will be allowed to amend his petition, and on another trial the court, in lieu of the two instructions quoted, will give one instruction as herein indicated.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

BIRMINGHAM S. R. CO. v. GUNN.

(Supreme Court of Alabama, July 21, 1904.)

[37 So. Rep. 329.]

Death—Willfulness—Pleading—Acts of Corporations—Proof.

In an action for death against a railway company, an averment that defendant wantonly or intentionally caused the death of plaintiff's intestate by wantonly or intentionally causing one or more of said cars to run upon or against plaintiff's intestate, charges the wantonness against the corporation as distinguished from the wrong of its servant, and is unsustainable without evidence that the corporation committed, or actually participated in the commission of, the wrongful act averred.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by William D. Gunn, administrator of the estate of Ethridge Nunnlee, against the Birmingham Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

A. G. & E. D. Smith, for appellant.

Bowman, Horsh & Beddow, for appellee.

SHARPE, J. This cause was tried upon the fourth count

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of the complaint, and upon no other. In that count the wrong averred is that "defendant wantonly or intentionally caused the death of plaintiff's intestate by wantonly or intentionally causing one or more of said cars to run upon or against plaintiff's intestate," etc. In *City Delivery Co. v. Henry* (decided at last term) 34 South. 389, this court, through its chief justice, said of a similar charge made against a corporation: "We see no escape from the conclusion that the wantonness, willfulness, and intentional wrong thus averred are the wantonness, willfulness, or evil intention itself, as contradistinguished from the wrong of the servant only, for the consequences of which the defendant is responsible merely because of its relation of employer," etc.; and it was held the action was in trespass, and that to sustain such an averment "proof of actual participation on the part of the defendant in the damaging act was essential." In this cause there was no evidence that the defendant corporation itself committed or actually participated in the commission of a wrong such as is averred in the fourth count. Therefore, and on the authority of the decision above referred to, together with that rendered in *Southern Bell Telephone Co. v. Francis*, 109 Ala. 224, 19 South. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930, and *Southern Ry. Co. v. Yancy* (in MSS.) 37 South. —, it must be held that there was error in the refusal of the general affirmative charge requested by the defendant.

In view of the character of the complaint and of the evidence, it seems unnecessary to consider other questions raised by the record.

Reversed and remanded.

DUNGAN *v.* WILMINGTON CITY RY. CO.

(Superior Court of Delaware, New Castle, Dec. 4, 1903.)

[58 Atl. Rep. 868.]

Street Railways—Collision with Team—Duty in Approaching Crossing.*

The motorman of a street car, and likewise the driver of a team, in approaching a crossing, must, where the line of vision is obstructed, use increased care and caution in proportion to such conditions.

Action on the case by James H. Dungan against the Wilmington City Railway Company. Verdict for defendant.

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Howell S. England, for plaintiff.

Walter H. Hayes and George N. Davis, for defendant.

*As to the mutual rights and obligations of street railways and other users of streets, see foot-note appended to *Mathiesen v. Omaha St. Ry. Co.* (Neb.), 11 R. R. R. 777, 34 Am. & Eng. R. Cas., N. S., 777; foot-note appended to *Haas v. New Orleans Rys. Co.* (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442.

SPRUANCE, J. (charging the jury). This action was brought by James H. Dungan, the plaintiff, against the Wilmington City Railway Company, the corporation defendant, to recover damages for loss and injury of the plaintiff's horse, carriage, and certain other property, alleged to have been caused by the negligence of the defendant company.

On the 10th or 11th of September, 1902—the precise day being immaterial—the carriage of the plaintiff, driven by his wife, was going easterly on Chestnut street, and an electric car of the defendant was going southerly on Monroe street, when a collision occurred between said car and carriage at the junction of the said streets. The plaintiff claims that the driver of the carriage was exercising due care and diligence, and that the collision was occasioned solely by the negligence of the servant of the defendant in charge of the car, which the plaintiff alleges was running at a high and dangerous speed, and without due and timely notice or warning of its approach by bell, gong, or otherwise. The defendant claims that the car was running at a moderate and proper speed, that due and timely warning of its approach was given by ringing its bell or gong, that the motorman was competent for the service in which he was engaged, and that he made every effort in his power to stop the car as soon as the carriage was discovered, and that he exercised due and proper diligence, and that the collision was not caused by the negligence of the defendant or its servant, but was caused solely by the negligence of the driver of the plaintiff's carriage.

Chestnut and Monroe streets are public streets of the city of Wilmington. The defendant company has the right to use Monroe street for the operation of its railway thereon, and the public have the right to use both of the said streets for the ordinary purposes of a public highway. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other. There can be no recovery in this case unless the injury to the plaintiff's property was occasioned by the negligence of the defendant company.

Negligence is the failure to use such care as a reasonably prudent and careful person would exercise under similar circumstances. Negligence on the part of the motorman of the colliding car would be the negligence of the defendant company; and negligence on the part of the plaintiff's wife, the driver of the carriage, would be the negligence of the plaintiff. Negligence is not presumed, but must be proved, and the burden of proving it is upon the party by whom it is alleged. In the joint use of a public street by ordinary vehicles and electric cars, those in charge of each are required to exercise due and proper care to avoid collisions. What is due and proper care depends upon the facts and circumstances of each case. Where there is more than ordinary

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danger, a proportionate increase of care and diligence is required of both. In approaching the crossing of a street in general use by the public, increased care should be exercised by the person in charge of the car to avoid collision with persons or vehicles who may be traveling on such street. He should not approach such crossing at a dangerous speed, or without giving due and timely warning of his approach; and if his view, or the view of travelers on the street he is approaching, is obstructed by buildings, fences, or otherwise, his care and diligence should be increased in proportion to such conditions. If he fails to use the care and diligence which is reasonable under the circumstances, the company is guilty of negligence. A person in charge of a vehicle approaching a railway crossing is bound to the reasonable use of his senses for the prevention of accident, and also to the exercise of such reasonable caution as ordinarily careful and prudent persons would exercise in like circumstances. A person approaching a railway crossing with which he is familiar is bound to avail himself of his knowledge of the locality, and act accordingly. If, as he approaches the crossing, his line of vision is unobstructed, he is bound to look for approaching cars, and if his line of vision is obstructed he should exercise increased care and caution in proportion to such conditions. The motorman and the driver of the carriage had each the right to presume that the other would act as a reasonable person, under all the circumstances of the occasion, until the contrary appeared.

If the injury to the plaintiff's property was caused by the negligence of the defendant's servant, without negligence on the part of the driver of the plaintiff's carriage, your verdict should be for the plaintiff; but, if such injury was caused by the concurrent negligence of both parties, the plaintiff would be guilty of contributory negligence, and your verdict should be for the defendant, as the law in such case does not weigh and balance the degree of negligence or responsibility attributable to each party. Your verdict should be for that party in whose favor is the preponderance or greater weight of the evidence. If your verdict should be for the plaintiff, it should be for such sum as will compensate him for the injury to his property as shown by the evidence.

Verdict for defendant.

WAGNER v. CHICAGO & N. W. RY. CO.

(Supreme Court of Iowa, July 12, 1904.)

[100 N. W. Rep. 332.]

Railroad—Trespassers—Injuries—Liability.*

Where a boy, running after his hat, went from the street onto the tracks and under the cars of a railroad, he was a trespasser in the railroad's yards, or at least the railroad's servants were under no obligation to keep a lookout for him, and for his injuries and death by the moving of the cars there could be no recovery, in the absence of evidence that the railroad's employees saw him.

Appeal from District Court, Story County; George W. Dyer, Judge.

Action at law to recover damages caused by the death of plaintiff's minor son, due, as is alleged, to the negligence of the defendant, its servants and employees. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. Reversed.

James C. Davis, for appellant.

DEEMER, C. J. Out of the accident referred to in *Wagner v. C. & N. W. R. R.*, 122 Iowa, 360, 98 N. W. 141, this case arose. The record is much stronger for the defendant in this case than in that. A witness was found who was with the little boy, Lawrence Wagner, when he was killed, who testified that he and Lawrence were upon the steps at the back end of an ice wagon going down Locus street toward the railway tracks; that when they arrived near the tracks Lawrence Wagner's hat blew off, and was carried by the wind toward Grand avenue; that they both jumped from the wagon, and Wagner ran after his hat; that the hat blew under the third car from the south, and that the Wagner boy crawled under after it, and that just as he got under the car it backed a little, and ran over him. It also appeared that he ran on the east side of the cars, which were standing on a side track, and that he was not using the defendant's yards for the ordinary purposes of travel.

He was clearly a trespasser in these yards, or at least the defendant's employees were not bound to keep a lookout for people who might be trying to catch hats which had been blown off by the wind. In this case the trial court should have sustained defendant's motion for a directed verdict. There was no evidence whatever that defendant's employees saw the boy. Indeed, it is doubtful if he could have been seen by them in time to have stopped the train after he had

*As to whether it is the duty of a railroad company to lookout for trespassing children on or about cars, see foot-note appended to *Wagner v. Chicago & N. W. Ry. Co.* (Iowa), 11 R. R. R. 789, 34 Am. & Eng. R. Cas., N. S., 789.

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placed himself in a dangerous situation. There was no evidence showing any liability on the part of the defendant. As sustaining our conclusions, see *Heiss v. R. R.*, 103 Iowa, 591, 72 N. W. 787; *Ills. Cent. R. R. v. Eicher* (Ill.) 67 N. E. 377; *Mabbott v. Ill. Cent. R. R.*, 116 Iowa, 491, 89 N. W. 1076; *A., T. & S. F. R. R. v. Shwindt* (Kan.) 72 Pac. 573. Moreover, the same errors were committed in this case as in *Wagner v. C. & N. W. R. R. Co.*, *supra*, and the judgment must in any event be, and it is, reversed.

CENTRAL OF GEORGIA RY. CO. v. FREEMAN.

(Supreme Court of Alabama, July 21, 1904.)

[37 So. Rep. 387.]

Accident on Track—Wanton or Intentional Injury—Pleading.

In an action against a railroad for injuries sustained by plaintiff, counts charging that defendant wantonly or intentionally caused an engine to run against plaintiff, and that defendant, through its servant or agent in charge of the train, wantonly or intentionally inflicted on plaintiff the injuries set out in the complaint by wantonly or intentionally causing or allowing the train to run against plaintiff, without characterizing the act as negligent, or in trespass.

Same—Same—Proof of Defendant's Actual Participation Essential.

Where an action against a railroad for injuries sustained was tried with certain counts of the complaint failing to characterize the act of defendant as negligence, but that defendant wantonly and intentionally caused a train to run against plaintiff, and through its servant or agent wantonly or intentionally inflicted the injuries set out in the complaint, proof of actual participation on the part of defendant in the damnifying act was essential to plaintiff's recovery.

Sufficiency of Evidence.

Evidence introduced to show who did run the train, or directed the manner of its running, or supplied the animus of the act complained of, having reference only to the engineer or person in the employ of the defendant who was on and in the immediate control of the train, was insufficient to sustain plaintiff's charges.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

Action by Robert A. S. Freeman against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Loudon & Loudon, for appellant.

Bowman & Harsh, for appellee.

SHARPE, J. On October 29, 1898, plaintiff, while attempting to walk across the defendant's railroad track in Alexander City, was run upon and injured by a locomotive drawing one of defendant's trains. To recover for the injury this suit was commenced on October 19, 1899, by a complaint consisting of five counts. The fourth and fifth of these

counts were held bad on a former appeal. 134 Ala. 354, 32 South. 778. After remandment of the cause, the fifth count went out on demurrer, and the complaint was, on October 25, 1902, amended by the addition of the sixth count and by striking out part of the fourth. In neither the fourth nor the sixth count is the act of running upon the plaintiff characterized as negligent, but the fourth, as amended, avers "that defendant wantonly or intentionally caused said engine or train to run upon or against plaintiff," and the sixth avers that "defendant, through its servant or agent in charge or control of said train, wantonly or intentionally inflicted upon plaintiff the injuries and damages set out in the first count of this complaint by wantonly or intentionally causing or allowing said train to run upon or against plaintiff," etc. These counts are in trespass. The only evidence introduced on the trial as to who ran the train, or directed the manner of its running, or as to who supplied the animus of the act complained of, had reference to the engineer or person in the employ of the defendant who was on and in the immediate control of the train. In *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389, there were counts which averred that "the defendant, through its agent or servant, John McClary, wantonly, willfully, or intentionally caused an ice wagon to run against plaintiff with great force, thereby throwing plaintiff upon the ground, and inflicting upon her serious injuries," etc. In the opinion rendered it was said: "We see no escape from the conclusion that the wantonness, willfulness, and intentional wrong thus averred are the wantonness, willfulness, and evil intention of the defendant itself, as contradistinguished from the wrong of the servant only, for the consequences of which the defendant is responsible merely because of its relation of employer to McClary. The charge involves the affirmative participation of defendant in the act of driving the wagon against the plaintiff, and not merely the defendant's responsibility for the act of its servant. It is, in effect, to say that the vehicle was run against the plaintiff by the direction of the defendant. The injury ascribed to the defendant is direct and immediate from force supplied by it, and not merely from force applied by the servant within the scope of his employment. The counts are in trespass for the act of the defendant itself, and not for the unauthorized act of the servant for which it is responsible. To sustain them, the proof of actual participation on the part of the defendant in the damnifying act was essential. No such proof, nor any evidence tending to establish such participation, was adduced. The affirmative charges with hypothesis requested by defendant on the second and fourth counts of the complaint should, therefore, have been given." That expression and the decision is in principle pointedly applicable to the present case, and so rules it as to show there was error in refusing the general affirmative charge requested by defend-

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ant on the fourth and sixth counts, for which the judgment must be reversed. For other authorities supporting this conclusion, see *Sou. Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 South. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930; *Sou. Ry. Co. v. Yancy* (in MSS.) 37 South. 341.

On counts 1, 2, and 3 of the complaint the jury was charged in favor of defendant, and, in view of that fact and the present state of the record, it seems unnecessary to further consider the assignment of error.

Reversed and remanded.

BARNUM v. GRAND TRUNK WESTERN RY. CO.

(Supreme Court of Michigan, Oct. 4, 1904.)

[100 N. W. Rep. 1022.]

Accident at Crossing—Contributory Negligence—Question for Jury.

In an action against a railroad for the death of a person at a crossing, evidence examined, and the question whether deceased was guilty of contributory negligence held to be for the jury.

Same—Negligence—Engine Backing after Passage of Train.

In an action against a railroad for the death of a person by being struck by an engine backing across a street on which deceased was driving in a closed wagon, and attempting to cross the track just after a freight train going in the same direction had passed, which the locomotive was backing out to aid in crossing a grade, negligence of the defendant cannot be inferred from the mere fact that the engine immediately followed the train.

Error to Circuit Court, Genesee County; Chas. H. Wisner, Judge.

Action by Hartson G. Barnum, administrator of the estate of George F. Nixon, deceased, against the Grand Trunk Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. W. Meddaugh (Geer & Williams, of counsel), for appellant.

Mark W. Stevens (George W. Cook, of counsel), for appellee.

HOOKER, J. Deceased rode in a closed wagon upon the track of defendant's railroad, immediately in front of a locomotive which was backing to the westward to aid a freight train, which had passed a short time before, in crossing a grade, and was struck by said locomotive, and received injuries therefrom, which caused his death a day or so later. In this action, brought by his administrator, a verdict and judgment were rendered for the plaintiffs for the sum of \$8,710.40, and the defendant has brought the case to this court by writ of error.

The negligence relied upon is stated in defendant's brief as follows: "(1) That it failed to allow a sufficient and reason-

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able length of time to elapse after the freight train crossed Beach street before the yard engine attempted to cross; that the yard engine followed the gravel train so closely that travelers and vehicles in the vicinity were not given a reasonable opportunity to cross; (2) that it failed to station a competent and vigilant person on the west end of the tender to watch for persons and vehicles approaching the crossing, and to warn them of the approach of the engine; (3) that it was its duty to keep a flagman, or maintain the equivalent—that is, crossing bells, etc.—at the Beach street crossing to warn travelers of the approach of trains, and that it failed to perform this duty; (4) that it failed to cause the engine bell to ring; (5) that the yard engine was running at an excessive rate of speed."

Defendant's counsel requested the court to direct a verdict upon the grounds (1) that the evidence showed that the defendant was not guilty of any negligence that caused the injury; (2) that the plaintiff's intestate was guilty of contributory negligence. These were refused. After the rendition of the verdict defendant's counsel made a motion for a new trial upon several grounds; one of them being that the verdict was contrary to the weight of the evidence. This was denied; reasons being given as required by law.

As this last point requires an examination of the evidence, we will state our conclusions regarding it first, and this will require a somewhat detailed statement of the testimony. The defendant's railroad crossed Beach street in a direction approximately an easterly and westerly course, and substantially at right angles. Within a block east of said street, this railroad was crossed by the Pere Marquette Railroad, which also crossed Beach street a few rods south of defendant's track, going southwesterly. There was an electric bell upon the crossing between the two Pere Marquette tracks, so arranged as to give warning for both roads, and this was ringing as deceased approached the track. A switch, or Y, extended from one railroad to the other upon the north side of the defendant's road. The plat appended shows the situation.

(Omitted as not essential.)

On this Y, some distance east of the street crossing, were two cars; the westerly one being a coal car and the other a box car. From the evidence and from the plat it conclusively appears that, from a point of view 10 feet from defendant's main track, the coal car was north of the line of vision to the eastward for a long distance; and we may also take judicial notice that an engine was visible from a wagon, when some ways further back from the track, over the coal car, which was much lower than a locomotive, and a finding to the contrary by the jury would have been unwarranted.

The undisputed proof shows that the deceased and a boy were riding in a covered and inclosed bakery wagon, with a small glass in front and open doorways at the sides, and a

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window just above the seat on each side, through one of which last the locomotive might have been seen, and was seen by the boy, immediately before the deceased drove upon the track; and the boy testified that they saw a freight train going west on defendant's road when they were half a block or more from the crossing, at which times they were crossing the bridge, 150 feet, or thereabouts, west of Lyon street. As he approached the track the boy looked east and saw the engine, and told deceased that an engine was coming. The horse was then walking. When told an engine was coming, deceased's horse was very near the track, and the engine was very close—he thought within 15 feet. The horse got across the track and stopped, or was stopped. The engine struck the wagon and shoved it along, until it caught upon something and tipped over. The boy got out of the front window, the horse ran away, and the man went under the engine. He did not hear any bell ringing. A number of witnesses testified that they heard the bell of the engine ringing, and one or more others testified that they did not hear it.

Several of the witnesses testified that there was a switchman upon the footboard of the engine, and the crew of the locomotive and the switchman himself so testified. It also appeared that the engine was proceeding westward to make a coupling with the freight train while in motion, which could hardly have been done in the absence of the switchman. The switchman testified that he was upon the footboard of the engine, which was proceeding at the rate of 5 or 6 miles an hour. He saw the horse and wagon driving up toward the track, and called to him to look out, gave the engineer the signal, and stepped off; and the engineer reversed his engine and applied his air. This was done as soon as deceased indicated an intention to cross the track, and at a time when the horse was 10 feet from the track. Kate H. Stevens, walking on the street, saw that there was going to be a collision, and ran behind a billboard so as not to see it. Her attention was attracted by the bell. Another witness, Powell by name, heard the engine and bell, saw the smoke, and could see the top of the engine over the coal car. He told his brother there was going to be an accident. Before he was struck the engine was reversed, and the drivers were turning the other way, and the witness heard the air set. He also saw the switchman signal to stop.

The evidence relied on to show that the brakeman was not there is as follows: The boy says that he did not see any one at the end of the tender. Question by plaintiff's counsel: "Was there anybody there, now? No, sir." Mortimer Phelps, a witness for the defendant, is said to be one who testified that no brakeman was on the engine; but the nearest that he came to it was to say that "when I got there the fireman, brakeman, and another man were assisting the man out from under

the engine." How this shows that the other man had not been upon the footboard is not very clear, nor do counsel attempt to explain how the brakeman happened to be there, if not one of the crew of the engine. He stated on redirect that he did not see the brakeman on the tender. Garner was on a Pere Marquette engine, some distance away, and did not see any one standing on the tender, or see any one jump off. Rothwell, a Pere Marquette switchman, some distance off, saw the engine, but did not see any one on the footboard, and did not see a man jump off. He thought he would have seen it, had it occurred.

Counsel claim that, if the testimony did not conclusively show contributory negligence, the court should have granted the motion for a new trial upon the ground that the verdict was contrary to the evidence; but, as the case must be reversed upon another ground, we do not pass upon the latter question.

The court instructed the jury as follows in regard to defendant's negligence: "It is for you to determine, under all the circumstances surrounding and conditions as they existed at and near the crossing, the buildings and other obstructions that you may find existed, the fact that the Pere Marquette Railroad was in close proximity, under all the facts in the case, whether the defendant railroad was exercising such ordinary and reasonable care and caution as ordinary prudence would dictate in running its engine and tender, backing the same, in such close proximity to the freight train that had just passed Beach street, going in the same direction and on the same track. If you find that the defendant railroad was not exercising such ordinary and reasonable care and caution in its conduct as ordinary prudence would dictate, then I charge you that the defendant railroad would be guilty of negligence, and the plaintiff would be entitled to a judgment, if you find that such negligence of the railroad was the proximate cause of injury, provided you further find that Mr. Nixon was exercising such ordinary and reasonable care and caution as an ordinarily prudent man would exercise under the same circumstances, surroundings and conditions as you will find they appeared to him at the time. The court instructs the jury that the defendant was not required to have a flagman stationed on Beach street where the accident happened, and the plaintiff cannot recover in this case for failure to have a flagman stationed there. The court instructs the jury, from the evidence in this case, they must find that the speed of the train at the time of the accident did not exceed six miles an hour. In speaking of the train, that refers to the engine and tender. And the court further instructs the jury that six miles an hour was not an excessive rate of speed, and did not, as an isolated circumstance, constitute negligence on the part of the defendant."

This was in effect allowing the jury to find that it was neg-

ligent for the defendant to permit its locomotive to follow its train at so short a distance and time. We have held in the case of *Breckenfelder v. Railroad Co.*, 79 Mich. 563, 44 N. W. 957, that we could not say as a matter of law that one going upon a track immediately after a portion of a train had passed, without looking to see if it was closely followed by another car or cars, was guilty of contributory negligence; but it was for the jury to determine whether one injured under such circumstances could be said to have used ordinary care, and to be, therefore, free from contributory negligence. We are of the opinion that the same rule should be applied here; but it does not follow that the defendant was guilty of negligence from the mere fact of sending its engine immediately after its train. If it may use a locomotive to push its trains over the grade, it must either couple it to the train before it starts, or have the right to follow at a constantly diminishing distance until it overtakes the train. If we were to say it should couple only to a stationary train, the engine must follow the train at a short interval, unless we are to require delay, after the train stops; and if we were to say that, it would not help the matter, for few persons would expect an engine or train to run up close to a stationary train. Safe railroading is often a matter of minutes, sometimes seconds, and it is not for juries or courts to determine what good or bad railroading requires, from their own notions, or from the fact that an accident has happened under certain conditions. It was not proper to say that the jury might find negligence from the mere fact that the engine followed the train.

The judgment is reversed, and a new trial ordered.

MOORE, C. J., and CARPENTER and MONTGOMERY, JJ., concurred.

GRANT, J. I concur in the result reached by my Brother Hooker. I think that upon this record there is no evidence of any negligence on the part of the defendant, and I think it is conclusively established that the deceased was guilty of contributory negligence. For these reasons, and for the further reason that no different state of facts can, in my judgment, be made to appear upon a new trial, I think none should be awarded.

DYER v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine, Aug. 27, 1904.)

[58 Atl. Rep. 994.]

Fires Set by Locomotives—Insurance—Subrogation—Application of Statute.*

That part of Rev. St. 1883, c. 51, § 64, as amended by chapter 79, p. 77, Pub. Laws 1895, giving to the railroad company the benefit of any insurance effected by the owner on property injured by fire communicated by a locomotive engine, is limited in its application to those cases in which the liability of the railroad corporation is created by that section and not by its own negligent act.

Same—Same—Same.*

When the fire is caused by the negligence of the railroad corporation, an insurance company which has paid a policy of insurance upon the property injured may maintain an action in the name of the owner against the railroad to recover from it the amount so paid, not exceeding the difference between the value of the property and any sum already paid by the railroad company to the owner.

Same—Presumption of Negligence.†

The fact that fire is communicated to property along the line of a railroad by sparks from a locomotive engine raises an inference of negligence in its construction, equipment, or management, sufficient to make out a prima facie case, in the absence of all other evidence as to the manner in which the engine is constructed, equipped, or operated.

Emery, J., dissenting.

(Official.)

Report from Supreme Judicial Court, Cumberland County.

Action by Thomas Dyer against the Maine Central Railroad Company. On case reported. Judgment for plaintiff.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, SAVAGE, POWERS, PEABODY, SPEAR, and EMERY, JJ.

Clifford, Verrill & Clifford, for plaintiff.

Nathan & Henry B. Cleaves and Stephen C. Perry, for defendant.

POWERS, J. This is an action at common law, brought

*For authorities in this series on the subject of the subrogation of the insurer who has paid losses by fire from a railroad locomotive, see *Hamburg-Bremen Fire Ins. Co. v. Atlantic Coast Line R. Co.* (N. Car.), 7 R. R. R. 177, 30 Am. & Eng. R. Cas., N. S., 177; *Crissey & Fowler Lumber Co. v. Denver & R. G. R. Co.* (Colo.), 2 R. R. R. 412, 25 Am. & Eng. R. Cas., N. S., 412; note, 15 Am. & Eng. R. Cas., N. S., 519 et seq.; *Lumberman's Mut. Ins. Co. v. Kansas City Ft. S. & M. R. Co.* (Mo.), 14 Am. & Eng. R. Cas., N. S., 127 (subrogation of foreign insurance company); *Chicago & A. R. Co. v. Glenny* (Ill.), 12 Am. & Eng. R. Cas., N. S., 839; *Lake Erie & W. R. Co. v. Falk* (Ohio), 17 Am. & Eng. R. Cas., N. S., 751.

†See foot-note appended to *St. Louis, etc., Ry. Co. v. Lawrence* (Ind. Terr.), 9 R. R. R. 414, 32 Am. & Eng. R. Cas., N. S., 414, where all the preceding authorities in this series on the subject of the presumption of negligence from the fact that a fire is communicated from sparks from a railroad locomotive are collected or referred to; *Atchison, etc., Ry. Co. v. Geiser* (Kan.), 10 R. R. R. 92, 33 Am. & Eng. R. Cas., N. S., 92.

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for the benefit of the Liverpool, London & Goble Insurance Company, to recover the amount of insurance paid by it to the plaintiff upon his buildings in Freeport, alleged to have been destroyed by fire communicated by sparks escaping from the locomotive engine of the defendant, through its negligence in the construction, equipment, management, and operation of the same. The defendant has already paid to the plaintiff the full amount for which it is liable under Rev. St. 1883, c. 51, § 64, as amended by chapter 79, p. 77, Pub. Laws 1895, and insists that it is under no further liability. That statute is as follows: "When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route, for which it is responsible, and may procure insurance thereon. But such corporation shall be entitled to the benefit of any insurance upon such property effected by the owner thereof less the premium and expense of recovery. The insurance shall be deducted from the damages, if recovered before the damages are assessed, or, if not, the policy shall be assigned to such corporation, which may maintain an action thereon, or prosecute, at its own expense, any action already commenced by the insured, in either case with all the rights which the insured originally had."

Independently of any statute, and prior to the enactment of chapter 9, § 5, p. 6, Laws 1842, the owner of property had the right at common law to recover damages sustained by fire communicated from a locomotive engine through the negligence of the railroad company using it. The act of 1842, which continued unchanged until 1895, broadened the liability of a railroad company, so that it was made to embrace all cases of fire communicated from its locomotive engine. It was no longer necessary to allege and prove negligence in the use of the engine, and the statute in effect made the railroad company an insurer. If the property damaged was insured, the insurance company was entitled to subrogation. In such case, the owner might collect of either party what he saw fit. If from the insurance company first, then that fact constituted no defense for the railroad company, and any sum collected by him in excess of what was necessary, with the insurance, to compensate him for his full loss, he held in trust for the insurance company. If, on the other hand, he collected from the railroad first, he thereby diminished to the same extent his claim against the insurance company. Both were insurers, the insurance company by virtue of its voluntary contract, and the railroad company by force of the statute which imposed the liability upon it. The liability of the railroad company was, however, primary, and that of the insurance company secondary, not in point of time, but in point of ultimate liability. *Hart v. Western R. R.*, 13 Metc. 99, 46 Am. Dec. 719.

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In this state of the law the statute was amended by chapter 79, p. 77, Pub. Laws 1895, giving to the railroad the benefit of any insurance upon the property, and providing that the insurance should be deducted from the damages if recovered before they were assessed, or, if not, that the policy should be assigned to the railroad corporation, which might then maintain an action thereon with all the rights of the insured. This amendment had special and particular reference to the adjustment of the liability of the two insurers—the insurance company and the railroad company—in those cases falling under the section which was amended, and in which it was necessary for the owner to invoke the statutory liability of the defendant corporation in order to recover against it. The Legislature might well deem it just that, as between the voluntary insurer by contract and the one who, without fault on its part, is made such by law, the latter should have the preference. To go further and say that in a case where the railroad company is liable because of its own fault and negligence, and not as an insurer, it should have the benefit of any insurance effected by the owner upon such property, would be a manifest injustice. The consequence of the defendant's negligence would then fall, not upon itself, but upon the insurance company; not upon the guilty, but upon the innocent. We cannot believe that a result so repugnant to justice could have been within the legislative intention. This action, therefore, may be maintained notwithstanding the amendment of 1895. That act is limited in its application to those cases in which the section amended makes the railroad company an insurer; in other words, to those cases in which the liability of the defendant is created by that section, and not by its own negligent act.

The result here reached is not in conflict with *Leavitt v. C. P. Ry. Co.*, 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152. In that case it was admitted that fire was communicated without fault or negligence on the part of the defendant, thus clearly presenting a state of facts under which the railroad was chargeable, not at common law, but solely because of its statutory liability. We are aware, also, that the right of subrogation was denied to the insurance company under a similar statute in *Lyons v. Boston & Lowell R. R.*, 181 Mass. 551, 64 N. E. 404; but that, like *Leavitt v. C. P. Ry.*, supra, appears to have been an action based upon the statutory liability of the defendant, and the questions here decided were not raised or considered.

This case comes before the court upon report, and the defendant contends it is not liable upon the facts. The undisputed facts are that on the date in question the defendant's locomotive engine, sending out an unusual amount of smoke and cinders, passed over its road through the plaintiff's farm, and about 300 feet from his buildings. There was no fire seen before the train passed, but it was discovered shortly

after in the grass near the railroad track, extending from the banks of the railroad to the plaintiff's buildings, which it consumed. No attempt is made to account for the fire at this time or place upon any other hypothesis, and we think it is a fair inference that the fire was communicated by sparks from the defendant's locomotive. *Gibbons v. Wisconsin Valley R. Co.*, 66 Wis. 161, 28 N. W. 170; *Chicago & A. R. R. Co. v. Esten*, 178 Ill. 192, 52 N. E. 954; *Smith v. London & S. W. Ry. Co.*, L. R. 5 C. P. 98; 13 Am. & Eng. Ency. Law (2d Ed.) 513.

The plaintiff must still prove that the defendant's negligence was the cause of the fire, and there is no evidence of any negligence on the defendant's part, unless negligence in the construction, equipment, or management of its locomotive engine can be inferred from the fact that the fire was communicated by sparks from it. On the question whether that fact alone is sufficient to make out a prima facie case of such negligence, there appears to be an irreconcilable conflict of authority. The most respectable courts, after careful consideration, have arrived at directly contrary conclusions. On the one hand, it has been held that no such presumption arises, because, first, the defendant is carrying on a lawful business in a lawful manner, and, second, that sparks and coals may escape notwithstanding all the safeguards have been adopted which modern science can suggest, and the greatest skill and care are employed in the operation of the engine. On the other hand, we may well presume that the defendant is not running locomotives over its road, the natural and probable effect of which would be to communicate fire to the property along this route if the locomotives were properly equipped and carefully managed, and when fire is so communicated the natural presumption is that it is due to negligence. More than that, such a presumption has its foundation in the necessities of the case. The locomotives of railroad companies by night and day rush with great velocity through the land. They are here to-day, and to-morrow may be hundreds of miles away. They are within the control of the defendant. The method of their equipment and manner of their operation are known to its employees, who are always present with the engine, and evidence touching this subject is easy of production on its part. The owner of the property destroyed has no such opportunities of knowledge. It may be often exceedingly difficult, if not impossible, for him to even identify the engine which has caused the injury, or to obtain the names of those who know about its equipment or its use. He is frequently absent, and, if present at the time and place of the fire, he can obtain but a momentary view of the locomotive. He has no opportunity for inspection, and knows nothing of its equipment and management. He can judge only by the result, and can often obtain no other proof as to whether the injury which he suffers has been

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caused by negligence. It is similar to those cases in which the burden of proof is cast upon him who best knows the facts. In this state the question is a new one. We are at liberty to adopt that rule which seems to us most consonant with reason and justice, and we think that negligence in the construction, equipment, or management of the defendant's locomotive engine may fairly be inferred from the fact that the fire was communicated by sparks from it, and that, there being no evidence or circumstances to rebut that inference, it is sufficient to enable the plaintiff to make out a prima facie case of negligence and maintain this action. This view is amply supported by the following among many authorities: *Chicago, B. & Q. R. R. v. Beal* (Neb.) 94 N. W. 956; *Illinois Central R. R. Co. v. Mills*, 42 Ill. 407; *Spaulding v. Chicago & Northwestern R. Co.*, 30 Wis. 110, 11 Am. Rep. 550; *Id.*, 33 Wis. 582; *Gulf Ry. Co. v. Benson*, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74; *Clemens v. Hannibal & St. J. R. R. Co.*, 53 Mo. 366, 14 Am. Rep. 460; *Burke v. Louisville & Nashville R. R.*, 7 Heisk. 451, 19 Am. Rep. 618; *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 387, 73 Am. Dec. 656; *Louisville & C. R. R. Co. v. Marbury Lumber Co.*, 132 Ala. 520, 32 South. 745, 90 Am. St. Rep. 917; *Same v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66. "In the case of railroad engines it has been repeatedly decided that the fact that the fire had been communicated by them to the premises is sufficient to raise a presumption that the railroad was not employing the best known contrivances to retain the fire, and to make out a prima facie case of negligence." *Cooley on Torts* (2d Ed.) 702. In the closely analogous case of *Dunning v. Maine Cent. R. R. Co.*, 91 Me. 87, 39 Atl. 352, this court felt the necessity of applying to the locomotives a somewhat more liberal rule of evidence than is applied in other cases.

Lowney v. New Brunswick R. R. Co., 78 Me. 479, 7 Atl. 381, is not an authority to the contrary. That case differed from the present in two all-important particulars: First, there does not appear to have been any sufficient proof that the fire was in fact communicated by the defendant's locomotive engine; and, second, the defendant introduced evidence tending to show that there was no negligence in either the equipment or operation of the locomotive. After stating that it might be doubted whether there was sufficient proof that the fire was communicated by the locomotive, the court say: "The negligence must be proved. Its relation as the efficient cause of the fire must also be proved. In this case we find no evidence of such negligence, nor of its causal relation. It is urged in the argument for the plaintiff that the dampers were probably open or warped, or that ignited coals may have been blown out of the ash pan, or that the smokestack might not have had proper appliances to arrest sparks. We do not find the evidence of them, however. Indeed, what evidence

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there was upon these points seems to negative the plaintiff's suggestions." If there was no sufficient proof that the fire was communicated by the defendant's locomotive, the question of negligence could not arise. If there was such proof, then the evidence negated the claim of the defendant's negligence. The question whether, when the fire is in fact communicated by the locomotive, and there is no evidence as to its manner of construction, equipment, and operation, negligence in one of those particulars may fairly be inferred from the escape of the sparks in such quantity and manner as to cause the fire, was not before the court in that case.

The value of the property destroyed was \$2,800, and the defendant has paid to the plaintiff \$1,120.

Judgment for plaintiff for \$1,680, and interest from the date of writ.

EMERY, J. (dissenting). While a steam locomotive of the defendant railroad company was in lawful operation, drawing a train of cars, sparks escaped from it, setting fire to the plaintiff's property. Despite the able reasoning of the majority opinion and the citations in support of it, I am unable to assent to the proposition that this escape of sparks, nothing further appearing, is sufficient evidence to establish negligence in the equipment or operation of the locomotive. I think there is danger in the proposition, justifying me in attempting to show reasons against it.

1. Apart from authority, the proposition seems to be based on the assumption that locomotives are ordinarily so equipped and managed as not to set fire to property along the route. The argument seems to be that the setting of fires by sparks from a passing locomotive is exceptional, and therefore indicates some fault in equipment or operation. I deem the argument faulty, in that it deals with the setting of fires instead of the escape of sparks; confounds the consequences, which may or may not ensue, with the act which is the subject under consideration. While the setting of fires by them may be very exceptional, the escape of sparks may nevertheless be of daily and hourly occurrence. Sparks may or may not set fires after their escape, according to events and conditions entirely outside of the railroad company's sphere of action or duty, as high winds, severe droughts, etc. Whether a given act or omission is negligent is not determined by its consequences. So whether a primary result is evidence of negligence is not determined by a secondary result. The negligence of the defendant, if any, was in the act or omission through which the sparks escaped, not in the escape itself. Hence, while the setting of fires may be evidence of the escape of sparks, it is not evidence of the cause of the escape, whether from accident or negligence.

It would seem to follow that the assumption, however indisputable, that locomotives are ordinarily so equipped and operated as not to set fires, does not sustain the proposition

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that the escape of sparks from a passing locomotive indicates fault in equipment or operation.

I think, to sustain the proposition, the assumption must be as broad as this, viz., that locomotives can be so equipped with known appliances and so operated in known modes that sparks will not ordinarily, or often, escape from them while in operation. There being no evidence whatever in the case upon this point, the assumption must be from common conceded knowledge, so common and undisputed that the court can act upon it without evidence. If the assumption has not this foundation, it must fall, and the argument with it.

Is it common knowledge, and undisputed, that such appliances exist, and that such modes of operation are known? I must confess my own ignorance of them. I do not understand it is claimed to be knowledge so common and undisputed; and whoever will observe the mass of cinders strewn the sides of railroad tracks, and will observe the smokestacks of locomotives running at night, will find, I think, much evidence to the contrary.

2. As to authorities, it is frankly admitted in the opinion that no case in this state has gone so far. It is also frankly admitted that eminent courts hold adversely to its views, while claiming support in the decisions of many other courts. Cases are cited in such support from Illinois, Wisconsin, Texas, Missouri, Tennessee, and California. I will not stop to inquire how far these decisions may have been influenced by the statutes of those states or by other circumstances, nor will I burden the reader with citations of cases the other way, for I think the proposition is in conflict with the declarations and even decisions of our own court. In *Sturgis v. Robbins*, 62 Me. 289, a case of fire escaping and causing injury, the court said, on page 290, "It is not to be presumed that an act lawful in itself was not done at a suitable time and in a careful and prudent manner." In *Nason v. West*, 78 Me. 253, 3 Atl. 911, the court said, on page 256, 78 Me., page 912, 3 Atl., "Presumption of negligence from the fact alone that an accident happened will not do, if there is any presumption in such a case it is that the defendants have complied with the obligations resting upon them equally with other men." In *Pellerin v. Paper Co.*, 96 Me. 388, 52 Atl. 842, the court, on page 391, 96 Me., page 843, 52 Atl., quoted the above expression from *Nason v. West*, and added, "No presumption of negligence arises from the mere fact than an accident has happened." In *Leach v. French*, 69 Me., 389, 31 Am. Rep. 296, the court said, on page 393, 69 Me., 31 Am. Rep. 296, "Negligence and misdoing are not to be presumed; there must be positive evidence of them." In *Lowney v. Railway Co.*, 78 Me. 479, 7 Atl. 381, a case of fire communicated by a locomotive, the court said, on page 480, 78 Me., page 382, 7 Atl.: "The burden upon the plaintiff, therefore, was to prove not only that the fire was communicated by the

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engine, but also that the defendants were guilty of negligence, and that their negligence was the cause of the communication of the fire. The communication of the fire alone does not import negligence." This seems quite an explicit declaration, and intentionally made. It is sought to distinguish the two cases, but I think the reader of both opinions will be convinced that the court in the Lowney Case was pressed with the same proposition, and considered it and intentionally pronounced against it. It will hardly be suggested that the concurring justices would have permitted such an explicit declaration to pass them unchallenged if they did not fully agree with it.

But, further, I think the court has also expressly and necessarily adjudicated upon the principle involved. *Bachelor v. Hegan*, 18 Me. 32, was, like this, a case of escaping fire, where fire lawfully upon the land of the defendant, but which he was by law bound to carefully guard and manage to prevent its escape to the lands of others, did escape to land of the plaintiff and set fire there. It was stoutly contended in that case, as in this, that the escape of the fire alone, if unexplained, was evidence of the defendant's negligence in the premises. The court squarely held that it was not. *Sturgis v. Robbins*, 62 Me. 289, was a similar case. The fire set by the defendant on his own land had escaped therefrom and set fire to property of the plaintiff. The plaintiff's counsel in effect advanced the same proposition, to wit, that the mere escape of the fire indicated that the defendant was in fault either in the time or manner of building his fire, which he must disprove or be held liable. The court held directly the contrary.

I do not find that either of these cases has since been questioned, though the escape of fire from lands and locomotives has been of frequent occurrence. They seem to me not distinguishable in principle from the case at bar. The defendant company had the right (as good as that of the farmer) to build and maintain fires in its locomotives as they lawfully passed by and near the plaintiff's buildings. In this particular case it was not bound as an insurer, but only bound to use due care to prevent the escape of the fire. If the escape of fire from the land of the farmer does not indicate fault in him which he must disprove, I do not see how the escape of sparks from the running locomotive of a railroad company indicates fault on its part which it must disprove.

3. But the majority opinion seems to be also based on the difficulty of the plaintiff in such cases as this in finding any other sufficient evidence of the defendant's negligence. It seems to be urged that, as it is so much easier for the defendant to prove that it was careful than for the plaintiff to prove that it was careless, it should be required to do so. Is not this in effect equivalent to saying that, whenever the plaintiff cannot prove the defendant's fault in a matter, that fault

should be assumed, and the burden be put upon the defendant to prove his innocence? How can this doctrine be limited, without obnoxious discrimination, to actions against railroad companies? Why is it not equally applicable to every case where the court thinks it easier for the defendant to prove his innocence than for the plaintiff to prove the fault or wrong? Is it not destructive of the presumption of innocence which has hitherto protected persons accused of negligence or any other tort or crime?

I think this court has never before intimated any approval of such a doctrine as applicable to a case where fault is necessary to be shown. In the case of *Dunning v. Maine Cent. R. R. Co.*, 91 Me. 873, 39 Atl. 352, cited in the opinion, no fault was to be proved. The company was an insurer. It was not only necessary to prove the communication of fire from the locomotive. Here it was necessary to prove that, and also the defendant's fault in the matter. On the other hand, the court seems to have been pressed at times with the argument that, when circumstances render affirmative proof of some essential element in the plaintiff's case difficult or impossible, the court should assume it to exist unless disproved; yet the court, while sometimes recognizing the hardship, has never dispensed with the proof. *McLane v. Perkins*, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487, and the cases already cited.

The Legislature, upon whom such arguments should be urged rather than upon the court, can meet the difficulty by imposing liability as insurer instead of mere liability as wrongdoer. It has done so in the case of fires communicated by locomotives, and has thus relieved persons injured by such fires from the burden of proving the fault of the owner or operator. It is competent, and I think expedient, for the Legislature to do so; but it seems to have left this plaintiff, under the circumstances of this case, to prove the fault of the company as prerequisite to recovery of damages from it. I think, therefore, the court should continue to hold in this case, as it held in *Bachelder v. Heagan*, and *Sturgis v. Robbins*, supra, and as it at least declared in *Lowney v. Railway Co.*, supra, that the mere escape of fire, lawfully upon the defendant's property, serving him in a lawful business, is not evidence of his fault; that the difficulty of proving his fault does not cast upon him the burden of disproving it.

NICHOLS *v.* CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Iowa, Oct. 19, 1904.)

[100 N. W. Rep. 1115.]

Private Crossings—Signals—Application of Statute.

Code, § 2072, provides that the engine whistle shall be sounded at least 60 rods before any road crossing is reached; and Code, § 48, cl. 5, provides that the term "road" means any public highway, unless otherwise specified: *held*, that section 2072 was limited to public highways, and did not require signals at private crossings.

Same—Same—Negligence—Common Law.*

Failure of a railroad company to give signal on approaching a private crossing is not negligence per se at common law.

Same—Killing Stock—Pleading—Failure to Signal at Public Crossing.†

Where, in an action against a railroad company for killing plaintiff's horse at a private crossing, the petition charged negligence only in failing to give signals on the approach to such crossing, the failure of the defendant to give signals at a public crossing, which was a short distance from the private crossing at which the horse was killed, was immaterial.

Appeal from District Court, Iowa County; O. A. Byington, Judge.

Action at law to recover the value of a horse alleged to have been killed by collision with defendant's train through the negligence of the trainmen. There was a directed verdict for the defendant, and plaintiff appeals. Affirmed.

J. T. Beem, for appellant.

J. C. Cook, H. Lewis, and C. E. Vance, for appellee.

WEAVER, J. The defendant's railroad crosses the plaintiff's farm between his dwelling house and a highway on the east. A lane or private road, about 25 or 30 rods in length, extends from the house to the highway. The crossing over the railroad track was formerly closed by gates, which were afterwards removed and an open crossing substituted at the plaintiff's request. On the evening of the day when the alleged accident occurred the plaintiff turned his horse out of the barn to drink at the tank or watering place in the yard. The entrance to the lane does not seem to have been closed, and when plaintiff sought to recapture the horse it ran down the lane in the direction of the crossing. Plaintiff did not pursue the animal, because it was its habit under such circumstances to return to the barn. It did not return, and plaintiff made no farther attempt to find it, and knew nothing of its whereabouts until the following morning, when its dead body was discovered at or near the private crossing.

*See foot-note appended to *Defrieze v. Illinois Cent. R. Co.* (Iowa), 8 R. R. R. 69, 31 Am. & Eng. R. Cas., N. S., 69.

†As to whether a railroad company is liable because of its failure to give crossing signals where the accident was not at the crossing, see foot-note appended to *Mitchell v. Union Terminal Ry. Co.* (Iowa), 10 R. R. R. 75, 33 Am. & Eng. R. Cas., N. S., 75.

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There is no evidence in the record as to the distance of the body from the rails, or of bruises or wounds upon the body, or other indications that the horse came to its death by collision with the train, except as that fact may be inferred from the finding of the body in the vicinity of the crossing. The specific negligence alleged is that the defendant's employees, in charge of a certain passenger train moving northward about 8 o'clock in the evening, neglected and failed to sound the engine whistle or ring the bell at least 60 rods before reaching the plaintiff's crossing, and thereby brought about the collision in which the horse was killed. No other act is complained of, and, if defendant is chargeable with negligence in respect thereto, it must be because it omitted a statutory duty in failing to give the signals, or that such omission was a breach of its common-law duty to exercise reasonable care in the operation of the train.

Code, § 2072, provides that in moving a railway train the engine "whistle shall be twice sharply sounded at least 60 rods before any road crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing it passed." It is the theory of the appellant that the words "any road crossing," as used in this statute, include private crossings like the one at which the collision occurred, and that the defendant's failure to give the signals was negligence as a matter of law. But this interpretation of the statute cannot be approved. Code, § 48, cl. 5, provides that "the term 'road,' as used in this Code, means any public highway, unless otherwise specified." It is not "otherwise specified" in section 2072, and we must therefore assume that the Legislature used the word intending it to be understood in the sense thus authoritatively declared. The defendant is therefore not chargeable with negligence because of failure to obey any statutory rules requiring signals for the plaintiff's private crossing.

Neither is there any rule of common law which makes it negligence per se to omit the signals. The company is bound to exercise reasonable care in the operation of its trains to avoid injury to persons and animals at all crossings, private as well as public; and if by reason of peculiar or extraordinary circumstances surrounding a crossing, and known to the trainmen, ordinary prudence would require an alarm or signal to be given by an approaching train, then its omission would be negligence, but in the absence of such circumstances no such duty arises. The record before us is entirely barren of any fact or suggestion which would justify the jury in finding there was any omission of reasonable care in this respect.

Some reference is made to the fact that there is a public crossing some 60 rods south of the private crossing, and as we understand the record it is said in evidence that the engine which is supposed to have struck the horse did not

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signal its approach to either. The petition does not charge any negligence in failing to signal for the public crossing, and it is unnecessary for us to consider what may have been the rights of the parties, had such an allegation been made.

In view of the conclusions above stated, we do not attempt to pass upon the sufficiency of defendant's showing that the herd law was in force in Iowa county at the time of the accident, or, if in force, what effect it would have upon plaintiff's right to recover damages.

There was no evidence upon which the jury would have been justified in finding the defendant guilty of the negligence charged in the petition, and the judgment of the district court is affirmed.

BOOTH v. UNION TERMINAL RY. CO.

(Supreme Court of Iowa, Oct. 27, 1904.)

[101 N. W. Rep. 147.]

Licensees—Persons Crossing Track in Alley.*

Where railroad tracks were laid in an alley between packing house buildings, and defendant had knowledge that for many years employees in the packing house had been in the habit of crossing the tracks at all points along the alley between the buildings, and that such practice was more common than the use of the crossing at one end of the platform, and no objection was ever made thereto, an employee killed by a train while crossing such tracks was a licensee, and not a trespasser.

Same—Same—Contributory Negligence—Failure to Look Again.†

Defendant maintained tracks in an alley between packing house buildings, with knowledge that the employees of the packing house uniformly crossed the tracks between the buildings. Deceased and two other packing house employees started to cross the tracks, and stopped and looked north for approaching trains, and, though their view was somewhat obstructed, they could see moving cars at least 500 feet away. No cars were seen by any of the three, whereupon they walked south on a platform about 35 feet, when they started to cross without again looking before going on the track. Deceased's companions got across, but deceased was struck and killed by a train from the north: *held*, that deceased was not guilty of contributory negligence as a matter of law.

Appeal from District Court, Woodbury County; G. W. Wakefield, Judge.

*See foot-note appended to Lovett v. Gulf, C. & S. F. Ry. Co. (Tex.), 11 R. R. R. 339, 34 Am. & Eng. R. Cas., N. S., 339, where all the preceding authorities in this series are collected or referred to; Bishop v. Illinois Cent. R. Co. (Ky.), 11 R. R. R. 328, 34 Am. & Eng. R. Cas., N. S., 328; Chesapeake & O. Ry. Co. v. See's Adm'r (Ky.), 11 R. R. R. 342, 34 Am. & Eng. R. Cas., N. S., 342 (mere acquiescence in use of track by pedestrians does not create a license); Koegel v. Missouri Pac. Ry. Co. (Mo.), 11 R. R. R. 358, 34 Am. & Eng. R. Cas., N. S., 358 (person walking near tracks in switch yards, where warnings are posted, is not a licensee); Wagner v. Chicago & N. W. Ry. Co. (Iowa), 11 R. R. R. 789, 34 Am. & Eng. R. Cas., N. S., 789 (use of space between tracks by the public); Riska v. Union Depot R. Co. (Mo.), 11 R. R. R. 294, 34 Am. & Eng. R. Cas., N. S., 294 (one crossing street at crossing is not a trespasser on the tracks of a street railway).

†See foot-note appended to Mease v. United Traction Co. (Pa.), 12 R. R. R. 272, 35 Am. & Eng. R. Cas., N. S., 272.

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Suit to recover damages for the death of Fay Booth. There was a directed verdict for the defendant, and from a judgment thereon the plaintiff appeals. Reversed.

J. L. Kennedy, E. A. Morling, and F. C. Davidson, for appellant.

Charles A. Dickson and T. F. Bevington, for appellee.

SHERWIN, J. The deceased was about 18 years old at the time of his death, and was then, and for several days previous thereto had been, in the employ of the Cudahy Packing Company in Sioux City. The plant of this company consists of a group of buildings separated by an alley several hundred feet in length running north and south. The killing and packing building, in which the deceased worked, was on the west side of the alley, and the timekeeper's office and the general office were at some distance apart on the east side of the alley. Extending the entire length of the alley, and near the center thereof, was the main switch track used by the defendant for the purpose of reaching the Cudahy plant and the Armour plant, which was situated some distance south of the Cudahy plant. Abutting the alley in front of the east row of buildings was a loading platform about three feet high running from the room occupied by the timekeeper south several hundred feet to the general office. There was also a platform of nearly the same in front of the west row of buildings. Near the north ends of these platforms there was a sufficient plank crossing connecting them. South of this crossing, and on either side of the main switch track, there was a track immediately in front of the platform. There were also two tracks north of the crossing, similarly situated. These side tracks did not, however, extend over the crossing in question, which was at grade where it crossed the track. The killing and packing building or room was south of this crossing and north of the general office. The deceased, with two fellow workmen, left the building together a little before 6 o'clock in the afternoon, for the purpose of reporting their time at the general office, coming out of the building through the hide cellar door onto the loading platform. Immediately in front of this point two cars, coupled together, were standing on the track, the north one of the two being an offal car and the south one an ordinary box car. Upon reaching the platform they stopped and looked to the north for a moment, and then walked south to a point a couple of feet south of the south end of the box car, where they left the platform to cross the tracks. The other two were ahead of the deceased, and crossed safely, but just as he stepped onto the main track he was struck and killed by one of the defendant's trains running south at the rate of 18 or 20 miles an hour. The engine was pushing one box car and drawing several others, and no alarm was sounded as the train went through the alley. One of the defendant's em-

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ployees was standing on the top of the forward car, but he was not looking ahead of the train. A motion to direct a verdict for the defendant was made and sustained at the close of the plaintiff's evidence, and we have two questions for determination: First, was the deceased a trespasser? and, second, if not, was he guilty of contributory negligence? The court sustained the motion on the latter ground.

A thousand or more men were employed in and about the Cudahy plant, and had been so employed a long time prior to the accident in question. Approximately one-half of the employees worked on the west side of these tracks, and each day when they quit work it was their custom, required by the rules of the Cudahy Company, to report their time either at the timekeeper's office or at the general office, depending upon the time they reported. The evidence showed that these employees, as well as those working on the east side of the tracks, were, and had been for years, in the habit of crossing the tracks at all points along the alley between the buildings; that such practice was more common than the use of the crossing at the north ends of the platforms; that this practice was fully known to the defendant's employees during all of the time, and that no objection had ever been made thereto by the defendant. The tracks were laid on the surface of the grounds, and between them and between the rails of each cinders had been put in and leveled off, so that the entire surface of the alley between the buildings was level and smooth.

In *Clampit v. C., St. P. & K. Ry. Co.*, 84 Iowa, 71, 50 N. W. 673, the plaintiff, in going back and forth between his home and his work, crossed the defendant's tracks on a footpath much used by the public, and which was just at the foot of a high bank where a stairway had been built by persons using such crossing. It was contended in that case that the plaintiff was a trespasser, and not entitled to recover, but we held otherwise, and said: "There were no fences along the road, and nothing to prevent all persons desiring to do so crossing the road freely. The defendant and the railroad company owning the track, or either, had in no manner forbidden the crossing of the track by footmen, and had thrown no obstacles in their way. The fact that the place at the stairs was used as a crossing by pedestrians, who also crossed at other places near by, was known by the employees of the defendant, and by the engineer who operated the engine which struck the plaintiff. The stairway and the ties across the ditch, as well as the path made by footmen, prominently advertised the place as a crossing used by pedestrians. No engineer or fireman passing along the tracks at that place with his eyes open, in the exercise of reasonable watchfulness and care, could have failed to see these indications of the footpath, and to understand therefrom that it was used by pedestrians, if he possessed ordinary intelligence. The de-

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defendants and the railroad company owning the track having through their employees and officers knowledge of the use of the footpath crossing, and having made no objections thereto, nor erected fences, walls, or other obstructions to such use, will be presumed to assent to it; thus giving all who use the crossing license therefor. The plaintiff, therefore, was not a trespasser upon the railroad track, but is entitled to all the rights and protection of one rightfully upon it with the license of the defendant." This case was followed in *Thomas v. C., M. & St. P. Ry. Co.*, 103 Iowa, 649, 72 N. W. 783, 39 L. R. A. 399, where a child was injured on the defendant's track, where the public was accustomed to travel with the knowledge of the defendant. After quoting from the *Clampit Case*, it was said: "This language applies as well to the facts in the case at bar. Here was an almost constant use of this track. Here were well-defined footpaths, and a ladder in use for years for the purpose of reaching the track. The track repairers knew the ladder was there. The roadmaster had actual knowledge of it. The superintendent had once, at least, been where, if he used his eyes, he must have seen it. It was in plain view of all the train operatives; * * * and, with the fact undisputed of the use of the ladder, paths, and track for years without objection from the defendant or any of its employees, all these and other facts would warrant a finding by the jury that use of the track was by the consent of the defendant, and therefore the child * * * was not a trespasser." We again approved the rule in *Scott v. St. L., K. & N. W. Ry. Co.*, 112 Iowa, 54, 83 N. W. 818, and in *Edington v. B., C. R. & N. R. Co.*, 116 Iowa, 410, 90 N. W. 95, 57 L. R. A. 561. The basis of these footpath decisions is that the use of the railroad tracks was so common and so well defined that the companies were charged with knowledge of such use, and, making no objections or obstruction thereto, were presumed to assent to it.

The instant case presents to our minds much stronger grounds for applying the rule thus announced than do any of the cases cited. Here the Cudahy buildings were arranged for the purpose of having switching facilities between them, and the tracks were laid through the alley for their accommodation. The buildings extended many hundred feet on each side of the tracks, and throughout the entire length they were occupied by the employees of the packing company, all of whom engaged on the west side of the tracks, at least, were required to cross the tracks at some time during the day. That they would cross at the point most convenient for them, rather than walk to the plank crossing, several hundred feet away, might well have been presumed by the defendant, in the absence of a physical demonstration that such was in fact the case. But for two years, at least, before the accident in question, these hundreds of men had crossed and recrossed these tracks daily with the full knowledge of the defendant.

When there was snow on the ground many well-defined paths crossed the tracks, but we do not deem this a circumstance of great weight because of the location and purpose of the tracks and the well-established fact that the men crossed at all points between the buildings. It is the knowledge of the constant use of the tracks that binds the railroad company, and when it appears that such use is at all points along its tracks for several hundred feet the case falls clearly within the rule of the cases cited. While a railroad company is not ordinarily required to look out for persons who may cross its tracks at points where there is no well-defined use thereof for such purpose by the public, it cannot be said as a matter of law that the defendant was not required to be on the lookout in this case. *Baltimore & Potomac R. Co. v. Cumberland*, 176 U. S. 232, 20 Sup. Ct. 380, 44 L. Ed. 447. The cases cited on this branch of the case by the appellee are based so largely upon the facts of each particular case that we will not extend this opinion for the purpose of reviewing them. In many of the cases the injured person was walking upon the railroad track, and in *Bryson v. C., B. & Q. Ry. Co.*, 89 Iowa, 677, 57 N. W. 430, we held that there was a distinction between walking on the track and crossing the same. In *Wagner v. Chicago & N. W. Ry. Co.* (Iowa) 98 N. W. 141, we held that the implied invitation to the public to use well-defined cinder paths provided for use as ways excluded an implied invitation to walk elsewhere, and therefore the defendant had the right to assume that the public would confine itself thereto. We reach the conclusion that the deceased was not a trespasser upon the defendant's track.

The two men who left the killing and packing house with the defendant were Dave Brodigan and John Haueser. Brodigan testified that both he and the deceased looked north for a moment or two when they first reached the platform, and that there were no cars moving on the tracks in that direction; that the three of them then went south on the platform about 35 feet to the south end of the box car, where they left the platform, and started across the tracks, he ahead, and the deceased behind; that just as he was about to leave the platform a friend on the east platform called to him to "hurry up, and beat Wells"; that he then jumped and started to run, and did not look for a train, or see or hear the one approaching from the north. Haueser followed Brodigan across the tracks, and both arrived safely on the other side. It was shown that the deceased did not again look north, nor did he look south, as he stepped by the end of the car and upon the track where he was struck. Just as he was stepping upon that track his peril was noticed by coemployees on the east platform, who called to him. He looked up, but in the same instant the train struck him. His view from the platform where he looked north was partially obstructed, but that it was not wholly so is shown by the evidence of wit-

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nesses who afterwards made observations from the same point, and under practically the same circumstances, and who testified that about two feet of an ordinary box car could be seen four or five hundred feet north; and the evidence tended to show that a train coming south from that point would come into clearer view as it approached until it reached the cars standing immediately in front of the hide cellar door. The plank crossing of which we have spoken was about 100 feet north of this cellar door. The record does not show by whom it was placed there, but does show that it was used for trucking and other purposes. Had the deceased gone to that crossing, he would have had no tracks to cross except the center or main one. There were cars standing on the west track north of the crossing, however, and whether the danger of crossing there without looking immediately before stepping upon the track would have been greater or less than where the deceased attempted to cross would depend very much upon his position on the crossing. Whether, under all of these facts and circumstances, it should be held as a matter of law that the deceased was negligent in not using this crossing, and in not looking and listening when he stepped around the car and before going upon the main track, are questions presented in argument, and the latter one, at least, is very close. As to the former, it is contended that the plank crossing afforded a safe way, and that it was negligence to cross at any other point. This was a question for the jury, however. The crossing was a private one, for which no statutory signals were required and none given. The train passed over it at the same speed that it traveled elsewhere through the alley, and, aside from the fact that the side tracks did not extend over it, it was no more safe than any other point between the buildings; and, as we have said, the implied invitation to cross the tracks applied as strongly to all other points as to this because of the long-continued custom and practice of the employees. Had it been an absolutely safe and convenient way, it might, perhaps, be said as a matter of law that the deceased was negligent in not using it. If the deceased's view from the platform when he looked north had been entirely obstructed, there can be no question as to his duty to again look when he reached a point where he could have seen the track, and under such circumstances the fact that others had safely crossed immediately before him would not, perhaps, excuse his neglect. But here he could have seen moving cars at least 500 feet away. He and Brodigan both looked north, and the latter saw no cars in motion; hence it may be presumed that the deceased saw none. They immediately thereafter started to walk south, and in a few seconds later the other two had crossed the track in safety ahead of the deceased, and without any warning to him that a train was approaching. Had the train been running at the ordinary yard speed instead of

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at the rate of 18 or 20 miles an hour, the deceased could have crossed the tracks in perfect safety, and is it not fair to presume that he considered this matter when he started from his point of observation to make the crossing? *Camp v. C. Gt. W. Ry. Co. (Iowa)* 99 N. W. 735.

Could different inferences justly be drawn from the acts of the deceased, under all the facts and circumstances proven? If so, it was error to hold as a matter of law that he was negligent. *Selensky v. C. G. W. R. Co. (Iowa)* 94 N. W. 272; *Cummings v. C., R. I. & P. Ry. Co.*, 114 Iowa, 86, 86 N. W. 40; *Moore v. C., St. P. & K. C. R. Co.*, 102 Iowa, 599, 71 N. W. 569; *McLeod v. C. & N. W. Ry. Co.*, 104 Iowa, 141, 73 N. W. 614, and cases there cited; *Schulte v. C., M. & St. P. Ry. Co.*, 114 Iowa, 94, 86 N. W. 63; *Cleveland, C., C. & I. Ry. Co. v. Harrington (Ind. Sup.)* 30 N. E. 37; *Pittsburg, Ft. W. & C. Ry. Co. v. Callaghan (Ill.)* 41 N. E. 909; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. While, as we have heretofore said, the case is close, we reach the conclusion that it should have been submitted to the jury, and the judgment is therefore reversed.

CENTRAL OF GEORGIA RY. CO. v. SPORT.

(Supreme Court of Alabama, July 21, 1904.)

[37 So. Rep. 344.]

Stock Injured on Track—Negligence—Question for Jury.

In an action against a railroad company for injuries to plaintiff's cow, evidence of defendant's negligence reviewed, and *held* to present a question for the jury.

Same—Failure to Maintain Lookout—Instruction Not Warranted by Evidence.

Where, in an action against a railroad company for injuring plaintiff's cow, it appeared that the track approaching the point where the injury occurred was straight for more than a mile, and one of plaintiff's witnesses testified that the engineer saw the cow some 75 or 100 yards before overtaking her, an instruction that if the jury believed the evidence, the engineer at the time of, and just before, the accident was keeping a lookout for obstructions on the track, was not supported by the evidence.

Same—Duty to Maintain Lookout—Instruction.*

In an action against a railroad company for injuries to a cow on the track, a requested instruction that if the jury believed the evidence, the engineer at the time of, or just prior to, the accident was keeping a lookout for obstructions on the track was misleading, in that it was calculated to induce the jury to believe that the engineer was under no duty to keep a lookout for the cow if she was not on the track, though in close proximity thereto.

Appeal from Circuit Court, Crenshaw County; J. C. Richardson, Judge.

*As to whether it is the duty of railroad companies to maintain lookouts upon trains in order to avoid injuring live stock, see extensive note appended to *Davis v. Southern Ry. Co. (S. Car.)*, 12 R. R. R. 188, 35 Am. & Eng. R. Cas., N. S., 188.

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Action by T. B. Sport against the Central of Georgia Railway Company for injuries to plaintiff's cow. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If you believe the evidence, your verdict should be for the defendant." "(6) If you believe the evidence, the engineer at the time of, and just before, the accident was keeping a lookout for obstructions on the track."

Chas. P. Jones and W. F. Thetford, Jr., for appellant.
M. W. Rushton, for appellee.

TYSON, J. Action for damages for negligently injuring a cow, the property of the plaintiff, in which a recovery was had, and from which defendant appealed.

It is first insisted that the trial court erred in refusing the general affirmative charge with hypothesis requested by defendant. This contention is predicated on the proposition that the testimony of defendant's engineer, who was operating the engine at the time of the infliction of the injury, is not in conflict with the testimony of Walden, a witness examined in behalf of plaintiff, who was an eye-witness to the occurrence. In this defendant's counsel are mistaken. Walden says that his attention was attracted to the occurrence by "the engineer blowing the whistle, and trying to get the cow off" the track. "The engine was seventy-five or one hundred yards from the cow when I first saw her." He also says "that the cow was on the track when I first saw her, and that she ran fifteen or twenty steps before the train struck her." He further says: "It looked like she run down the road, and when she did, the engineer threw the throttle wide open, and increased the speed of the train, and struck her." If this testimony is to be believed, a plainer case of negligence on the part of the engineer could scarcely be proven. The engineer, however, denies all this. He testified, in substance, that the cow came suddenly from behind a pile of lumber, within 10 or 15 feet of the track, which hid her from his view, when his engine was about 150 feet away, traveling at a rate of speed of 20 miles per hour, and that as soon as he discovered that she was going upon the track, he applied all the necessary means at hand to stop his train, and that it was impossible to do so, although it was equipped with all the modern appliances. He, however, did, he says, reduce the speed to about 10 miles an hour before striking her. He also says the cow only ran down the track about 5 feet before she was struck. Clearly this conflict between the testimony of these two witnesses was a matter for the jury, and not for the court. The charge was properly refused.

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Charge numbered 6 was also properly refused. Under the evidence, it cannot be affirmed as a fact, free from adverse inference, that the engineer was at the time, and just before, the cow was struck, keeping a lookout for obstructions on the track. The track is shown to have been straight for more than a mile, and if it be true that the cow was seen, as Walden testified, by the engineer some 75 or 100 yards before overtaking her, the inference may be indulged that he was not keeping a lookout for obstructions, as asserted by the charge. Moreover, the charge was misleading. It was calculated to induce the jury to the belief that the engineer was under no duty to keep a lookout for the cow if she was not on the track, though in close proximity thereto. Besides the form of the charge was bad. It did not predicate a finding by the jury of the fact asserted in it, although it hypothesized their belief of the evidence.

We do not think the trial court erred in refusing the motion for a new trial. The case was clearly one for the jury, and their verdict, in our opinion, ought not to be disturbed. Affirmed.

DUNKLE v. CITY PASSENGER RY. CO.

(Supreme Court of Pennsylvania, May 2, 1904.)

[58 Atl. Rep. 268.]

Street Railways—Collision—Evidence.*

Evidence in an action to recover for personal injuries caused by a collision between plaintiff's sleigh and a street railway car examined, and *held* to require the direction of a verdict for defendant.

Appeal from Court of Common Pleas, Blair County.

Action by L. G. Dunkle against the City Passenger Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and DEAN, BROWN, POTTER, and THOMPSON, JJ.

W. C. Fletcher, for appellant.

Thomas H. Greevy, for appellee.

THOMPSON, J. The failure of duty from which springs the alleged negligence on the part of the appellee is limited to a very narrow compass. When the accident occurred the car of the appellee was running at a moderate rate of speed, not exceeding four miles an hour. It was dark, and the headlight of the car was properly lighted, the motor was in proper order, and the car under control. The motorman was in his

*As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-note appended to *Annis-ton Electric & Gas Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312, where all the preceding authorities in this series are referred to.

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place and attending to his duties. There was therefore no substantial ground for negligence arising from the condition of the car or its management. It was, however, alleged that appellee was guilty of negligence because its motorman did not stop the car in time to enable him to avoid the collision. The accident occurred in the latter part of January, at an early hour in the morning, while it was dark. The appellant was going into Altoona in his sleigh, and, it being cold, was warmly wrapped up. As he passed along one of the streets, some 150 or 200 feet from the approaching car, his horse backed upon the track. Having whipped him, he succeeded in getting him off from it. When moving on the outside of the track, and quite near the approaching car, he hallooed and shouted to the motorman to slow up. Just at this time his horse backed upon the track, and the accident then occurred. He had only time to halloo and to hold up his hand when the collision took place. He was unable to say how far the car was distant from him when the horse backed the second time upon the track, but he guessed it was 50 feet. He said he could not see the motorman, because of the headlight, and he could not say whether he heard him when he hallooed or not. The wife of the appellant was in the sleigh at the time, and testified that she judged that the car was 50 feet away when her husband waved his hand and whip; that it all occurred "so quickly that it all happened at one time." She seemed to think that, if the motorman had looked, he could have seen the whip when it was waved. The argument that from this evidence negligence on the part of appellee might be deduced is inconsequential, and this in consequence becomes most distinctly so in connection with the testimony on its behalf. The motorman testified: That when he first saw the horse and sleigh they were between 50 and 60 feet from him. They were outside of the track. The horse backed the sleigh upon the track, and the car, after striking it, ran some 10 or 15 feet before it stopped. That he had the car under control, with the power off. That he saw the horse back the sleigh upon the track, and at once reversed the motor. That he heard the appellant halloo when the horse had backed upon the track, but he saw no motion of the whip by the appellant. That the sleigh was on the outside of the track, some 50 feet away. The horse was not backing, but was moving along. That he only discovered the horse backing when the sleigh was about 10 or 15 feet from the car, that he made every effort to stop it, and that the car was running about 4 miles an hour. The conductor of the car testified that it went about 15 feet after it struck the sleigh; that he saw the appellant on the outside of the track, clear of it, and he saw him after he was struck; that the car was running about 4 miles an hour, and that he did not hear appellant halloo. The testimony of a passenger was substantially a confirmatory. This evi-

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dence does not warrant the conclusion that the motorman heard the appellant, or, its being dark, that he saw or could have seen the motion of the whip made by appellant when he was outside of the track. The case, therefore, is one of that class of cases where the accident is caused by a horse suddenly becoming frightened, and resulting in an unavoidable collision, where the evidence does not establish negligence. *Yingst v. Lebanon, etc., St. Ry. Co.*, 167 Pa. 438, 31 Atl. 687; *Smith v. Holmesburg, etc., Electric Ry. Co.*, 187 Pa. 451, 41 Atl. 479.

The assignments of error are not sustained, and the judgment is affirmed.

BUTLER v. ROCKLAND, T. & C. ST. RY.

(Supreme Judicial Court of Maine, July 26, 1904.)

[58 Atl. Rep. 775.]

Street Railways—Duty to Avoid Injuring Other Users of Streets.*

A street railway company has the lawful right to operate its railway in the location where it has been placed, and run its cars singly or in trains upon the track; but it is its duty to do so having due regard to the safety, not only of travelers upon the street, but of those who may have occasion to cross the track in driving out from the yards of houses situated along the railway.

Same—Same—Right to Assume That Other Users Will Be Careful.

The speed at which a car or train may properly be run, the kind of control over it, and the degree of watchfulness imposed upon those in charge must depend to some extent upon the surrounding conditions, such as the nearness of the track to the side of the street and to the houses, the likelihood of persons driving out from the yards, and whether the driveways are so situated that persons driving out over them can see or learn of the approach of cars in season, with due care to avoid collision. The railway company and its servants have a right to assume that all such persons will themselves be in the exercise of ordinary care.

Same—Same—Speed—Lookout.*

It is the duty of a street railway company at all times to use due care in view of apparent dangers, and those which may reasonably be expected, so to regulate the speed of its cars, so to have them under control, and so to be on the lookout for a team about to cross that those in the teams, if they themselves are in the exercise of due care, shall not be put in jeopardy.

Same—Same.*

The person in charge of the car must exercise due care and judgment, and the movements of the car must be regulated with reference to the apparent situation. If it be apparent that a collision is likely to occur, it is the duty of the servant in control of the car to be ready to use, and to use, if necessary, and when necessary, all practicable means to prevent it.

Case at Bar.

Applying the foregoing rules to the evidence in this case, *held*, that the jury were warranted in finding that the defendant was negligent. **Negligence and Contributory Negligence.**

But the evidence also shows that the plaintiff was clearly negligent,

*See foot-note appended to *Anniston Electric & Gas Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312.

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and that his negligence contributed to the injury, and in such a case, where the plaintiff is guilty of contributory negligence, he must fail, unless it appears further that after the plaintiff's negligence, independent of and distinct from any prior negligence of his own, the defendant was negligent, and that this negligence was the proximate cause of the plaintiff's injury. It must appear at some point of time, in view of the entire situation, including the plaintiff's negligence, the defendant was thereafter culpably negligent, and its negligence the latest in the succession of causes.

Same—Proximate Cause.

Held, that the defendant's negligence was not subsequent to and independent of the plaintiff's contributory negligence, but that it was contemporaneous with it, and operated to produce the result in connection with the plaintiff's negligence, and not independently of it; that the plaintiff's negligence actively continued from a point about 20 feet from the railway track, where he first had opportunity to see the approaching train of the defendant, which was not more than 200 feet away, to the point of collision; and that it was operative to the last moment, and contributed to the injury as the proximate cause.

Same—Concurring Negligence.

The doctrine of prior and subsequent negligence is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous.

(Official.)

On motion from Supreme Judicial Court, Knox County.

Action by Herbert C. Butler against the Rockland, Thomaston & Camden Street Railway to recover damages for personal injuries sustained by plaintiff in a collision between defendant's car and the team in which plaintiff was riding. Plea of the general issue. Verdict for plaintiff for \$8,157.50. Motion for new trial by defendant sustained.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, SAVAGE, POWERS, and SPEAR, JJ.

J. E. Moore and D. N. Mortland, for plaintiff.

Arthur S. Littlefield and Orville D. Baker, for defendant.

SAVAGE, J. Case for damages for personal injuries sustained in a collision between defendant's cars, and the team in which the plaintiff was riding. The plaintiff obtained a verdict, which the defendant, on motion, seeks to have set aside.

It appears that the line of the defendant's railway in Rockport, at the point where the collision occurred, lies on the easterly side of the highway, and the outer rail, towards the sidewalk, is 19 feet from the southwesterly corner of a house known in the case as the "Shepard House." By the driveway leading easterly from the street by the southerly side of the Shepard house to the yard the distance from the rail to a point opposite the corner of the house is 20 feet. Standing at the corner of the Shepard house, and looking northerly towards Camden, the first object or obstruction to vision is a trolley pole about 84 feet from the center of the driveway, and the ordinary distance easterly from the rail.

One hundred and thirty-one feet further on in the same direction is another trolley pole, and on each side of the pole a tree a foot and a half in diameter. The trees were each about 10 feet from the pole, were in line with it, and trees and pole were about parallel with the railway track. These trees and pole partly obscure a view of the track. One hundred feet further on, or 315 feet from the center of the driveway, is a third trolley pole. Between the second and third poles, but easterly, and upon the easterly side of the road, is a house called the "Burgess House." There are three slight curves in the railway track, and beyond the Burgess house, near the third pole spoken of, the house obstructs the view, and the track passes from the sight of an observer who may be at the corner of the Shepard house. So much for the physical situation, about which there seems to be no controversy.

On October 2, 1902, the plaintiff, who was a clerk in a grocery store, was driving a covered delivery wagon. The cover extended so far forward as the front edge of the seat, and rose perpendicularly, and so over to the other side. The effect was that the plaintiff, if sitting on the seat, could not look out at a right angle without leaning forward. He started from Rockport village, which is southerly from the Shepard house, and drove to that house, where he called. He testified that on his way he met one of the defendant's passenger cars proceeding from Camden towards Rockport. These cars run half-hourly. He drove into the yard on the southerly side of the Shepard house, made a delivery of goods, returned to the wagon, took his seat, turned, and drove out westerly towards the street. The plaintiff testified that as he came out of the yard he looked southerly in the direction of Rockport, having in mind the car which naturally would cross the one he had met at Eell's crossing, further to the south, and would be coming towards the Shepard house; also that when he reached the corner of the Shepard house he pulled up the reins a little, and leaned forward a little, and looked northerly on the track towards Camden; that he did not see any cars, nor hear any, nor hear any bell or gong; that he then settled back upon the seat, and drove onto the track, and that his horse was walking all the time. Meanwhile a train of the defendant's cars loaded with lime rock was being propelled southerly from a quarry past the Burgess house and the trees which have been spoken of, towards the driveway at the Shepard house, on its way to the lime kilns in Rockport. The train consisted of three rock cars pushed by a motor car in the rear. Each rock car was 13½ feet in length and the motor car was 19 feet. The length of the train was in all 59½ feet. The weight of the train was approximately 32½ tons. Just as the plaintiff's wagon was over the rails at the driveway, it was struck by the forward rock car, and the plaintiff was thrown out and seriously injured. The wagon

was thrown forward to the left hand, but the horse on the right apparently was not touched. The car itself was derailed. The train pushed it along about 25 feet before it stopped.

The plaintiff claims that the train was traveling at the rate of at least 16 miles an hour, while he himself was going at the rate of not more than 2 or 2½ miles an hour. The defendant claims that the train was moving only from 6 to 8 miles an hour, and that the plaintiff drove his horse down the driveway at a quick trot, say 6 miles an hour, slowing somewhat as he approached the track.

Beyond an estimate of the speed at which the train was moving several hundred feet before the driveway was reached, the plaintiff introduced no direct testimony respecting the movements of the train. But the defendant's witnesses the trainmen testified, in effect, that the train had reached a point 50 or 60 feet from the driveway, when the plaintiff's horse appeared from behind the Shepard house, going towards the track at a trot; that the brakeman on the front end of the front car instantly shouted, and signaled to the motorman to stop; and that the motorman at once reversed the action of the motor, the effect of which was to reduce the speed of the train so suddenly that the front brakeman was thrown from the car, and this, he says, was almost at the same instant that the car struck the wagon. He also testified that the collision occurred before he had time to set his brake, the chain of which was slack at the time. The witness also testified that the gong on the motor car was ringing, and had been ringing for several hundred feet back. They estimated the speed of the train at from six to eight miles an hour, and testified that by reversing the motor—the most efficient process known—the train could be stopped in from 75 to 100 feet.

The burden was upon the plaintiff to show that his injuries were caused by the negligence of the defendant or his servants, and that no want of due care on his part contributed to the injury, or, if he himself was guilty of contributory negligence, that some distinct and later negligence of the defendant was the proximate cause of the injury. *Atwood v. Railway*, 91 Me. 399, 40 Atl. 67. The defendant contends that it is so clearly manifest that the plaintiff has not proved any one of these essential propositions that the court is required to set the verdict aside to prevent a miscarriage of justice.

1. Was the defendant or its servants guilty of negligence? Or, to state the question more accurately, were the jury justified in finding them guilty? In finding them so, is their conclusion unmistakably wrong? The court is not required, or even permitted, to set aside a verdict merely because the jury came to a conclusion different from that to which the court would have come. The jury have the right for them-

selves to determine the credibility of witnesses, to determine how far their stories are true, and from the truth of the statement thus ascertained to make all legitimate inferences; and, unless their conclusions are palpably wrong, their verdict cannot be disturbed.

This defendant had a lawful right to operate its railway in the location where it was placed, and to run its cars singly or in trains, upon its track; but it was its duty to do so having due regard to the safety not only of travelers upon the street, but of those who might have occasion to cross the track in driving out from the yards of houses situated along its railway. The speed at which a car or train may properly be run, the kind of control over it, and the degree of watchfulness which is imposed upon those in charge must depend to some extent upon the surrounding conditions, such as the nearness of the track to the side of the street and to the houses, the likelihood of persons driving out from the yards, and whether the driveways are so situated that persons driving out over them can see or learn of the approach of cars in season, with due care, to avoid collision. The defendant and its servants had a right to assume that all such persons would themselves be in the exercise of ordinary care. While, as was said in *Flewelling v. Railway*, 89 Me. 593, 36 Atl. 1057, "electric street cars have, in a qualified way, at least, the right of way as against persons on foot or traveling with carriages and teams, in the same manner as ordinary steam railroads have," yet we think it is only "in a qualified way." The movements of their cars and trains are more easily and quickly controlled than are those of steam railroads. The speed at which they may properly travel along the highways is much less than the ordinary speed of steam railroads. Instead of a right of way exclusive except at crossings, they exercise their right of way in a public thoroughfare, to which many people must have access from their houses. And this access to the highway must in many cases, as in this, be had across the railway tracks. "Travelers with teams and proprietors of street cars still have concurrent rights and mutual obligations." *Atwood v. Railway*, *supra*.

In fine, it was the duty of the defendant to this plaintiff at the time in question to use due care, in view of apparent dangers, and those which might reasonably be expected, so to regulate the speed of its cars, so to have them under control, and so to be on the lookout for a team about to cross the track that the plaintiff, if he was himself in the exercise of due care, should not be put in jeopardy. We do not mean to be understood as saying that a street railway company must stop or slacken the speed of its cars every time a person is seen to approach the track with apparent intent to cross it. It may properly be assumed that the traveler, if far enough away to cross safely, will continue his movements, and cross in front of the car, or, if not far enough away, and if

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warned of the approach of the car, that he will stop, and let the car pass first. The person in charge of the car must exercise due care and judgment, and the movements of the car must be regulated with reference to the apparent situation. *Tashjian v. Worcester Street Railway*, 177 Mass. 75, 58 N. E. 281. If it be apparent that a collision is likely to occur, it is the duty of the servant in control of the car to be ready to use, and to use, if necessary, and when necessary, all practicable means to prevent it. Nothing less is due care.

Now to apply these general propositions of law to such conclusions of fact as we think the jury were warranted in finding in this case. In doing this, we must, as in all cases upon motion for a new trial, take those conclusions most favorable to the verdict, provided the jury were justified in finding them. We think that the jury might have found properly that the train of cars was running much faster than 6 or 8 miles an hour, perhaps as fast as 16 miles an hour, and that the plaintiff was traveling at no greater speed than 2 or 3 miles an hour. If so, the plaintiff's horse came within the range of view of the defendant's brakeman when he was more than 200 feet distant from the driveway. In such case it was the duty of the brakeman to use due care in keeping watch of the movements of the horse. Nevertheless the jury might have found that the brakeman did not in fact discover the horse approaching the track until the train was only 50 or 60 feet from the crossing, when it was too late to stop the train before reaching the crossing. The jury might have found that no steps were taken to reverse the motor until the forward car reached the crossing. They might have found that to run a train of cars as fast as this one was run, with such momentum as this one had, with slack brakes, in such proximity to the Shepard house and driveway, was dangerous, and that in doing so the defendant was negligent. They might have found, as we shall notice later, that while the plaintiff was driving towards the track, apparently ignorant of the approach of the train, the defendant's servant whose duty it was to watch had a full opportunity to see him more than 200 feet away, and yet negligently failed to discover him until 50 feet away, when he had not even time to set his brakes before the collision. They might have found that the motor was not reversed as quickly as it ought to have been after the plaintiff was discovered. Surely, if these conclusions were warrantable—and we think they were—it cannot be said that the verdict of the jury establishing the negligence of the defendant was so far unmistakably wrong.

2. Was the plaintiff guilty of contributory negligence? We think it is demonstrable that he was. He says that upon passing the corner of the house he leaned forward, looked to the north, but saw no car, and heard no bell or gong. From all the testimony in the case, aided by photographs which witnesses on both sides say represent the situa-

tion correctly, it is clear that the plaintiff at the corner of the house could have seen the track at least 300 feet distant, and the body of a car a further distance still. It is argued that his vision was interrupted while the train was passing behind the trees near the second telegraph pole, about 200 feet north of the driveway, and that this accounts for his not having seen the train. But we think the evidence shows clearly that at no time could the entire train of three cars and motor, all 59½ feet in length, have been hidden by the trees, and that there was no time after the train first came in sight north of the Burgess house that the cars, or some of them, were not in plain sight to a person looking from the corner of the Shepard house. If we take the estimate of speed, both of himself and of the train, as contended for by the plaintiff, he will not be aided. He says his horse was walking. His counsel urge that the speed should not be estimated as greater than two miles an hour. We cannot see how it could be less, and, if more, it would only show that the train was still nearer than he contends. His claim is that the train was traveling at the rate of at least 16 miles an hour. If so, the train was traveling eight times faster than he was. While he was going the 20 feet to the railway, the train would have passed over 160 feet. In other words, when the plaintiff was at the corner of the house, the head car of the train was 160 feet from the crossing. It was in plain view, with nothing to obstruct vision, except one trolley pole. If we assume that the train was going at the rate of 20 miles an hour, it was traveling ten times faster than the plaintiff, and would have been 200 feet from the crossing when the plaintiff says he looked. But at 200 feet the forward cars, at least, must have been in plain view of the plaintiff. For the train to have been beyond the sight of the plaintiff when he says he looked, it must have been traveling more than 30 miles an hour, in order to reach the crossing when he did. But there is nothing in the case which warrants any such estimate of speed. If the train was traveling at a speed less than 16 miles an hour it must have been still nearer the crossing when the plaintiff came by the corner of the house.

Coming back to the evidence in the case, and taking the contentions of the plaintiff's counsel as to speed, we are forced to one of two conclusions—either that the plaintiff, if he looked for cars, saw the train less than 200 feet away, and moving toward the crossing, or that he did not look at all to the north. We do not think it possible under the given conditions that he could have looked, as he says he did, without seeing the train; and it seems incredible, if he looked and saw the train, that he would have proceeded in the manner he did. In our view, it is immaterial which horn of the dilemma is the true one. The plaintiff's conduct, his sitting back on the seat of the wagon where he could not see the track, his driving at a walk, as he says, right in front of the

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coming train, his apparent indifference to the train, all point to the conclusion that he was not aware of the proximity of the train, as he would necessarily have been if he had looked.

While the rule that a traveler must look and listen before passing over a railroad crossing has been held not applicable to street railroads (*Fairbanks v. Railway*, 95 Me. 78, 49 Atl. 421; *Warren v. Railway*, 95 Me. 115, 49 Atl. 609), still it is necessary that a traveler approaching a street railroad crossing is bound to exercise some care to avoid danger of collision. He must exercise ordinary care, the care of an ordinarily prudent man, in view of all the existing conditions. He must take into account the probability of cars being near at the time, and the opportunities for observing them. He must have regard to his own speed, and must take some notice of the apparent speed of the approaching car, if seen. It is not necessarily negligence for a traveler to cross a track in front of an approaching car, even if he had misjudged its distance and speed. *Coleman v. Railway*, 181 Mass. 591, 64 N. E. 402; *Driscoll v. Railway*, 159 Mass. 142, 34 N. E. 171. Whether a traveler in such a case is negligent depends upon the facts in the case. But he must exercise due care and judgment about it. He cannot sit under cover, and not look, or, if he looks, not see, a car plainly before his eyes, and have no care whatever, and then say he has fulfilled the measure of the law.

The plaintiff owed it to himself and to the defendant to exercise reasonable care to anticipate and avoid a collision. If the plaintiff saw the train of cars approaching the crossing, less than 200 feet away, as we think he must have done if he looked, and then settled back into his seat out of sight of the cars, and drove onto the track at a walk, without taking any care to observe the further approach of the cars, it was a reckless proceeding on his part, and we think it impossible to hold that he was not negligent.

On the other hand, if he drove out of the yard without looking, or ascertaining in any way whether cars were near, or without doing any act or employing any sense in an endeavor to ascertain whether crossing the track would be safe or otherwise, we think he was negligent. Upon this hypothesis the case shows that the plaintiff did not see, but that he sat back under the cover of his wagon, where he could not see. He was clearly inattentive, for he did not know of the train at all until the moment of collision. He did not even hear the buzz of the electricity, which must have been audible at some distance to an attentive ear. It is no answer to say that the plaintiff was justified in his inattention by the fact that no regular car was due there at that time, for it appears that the plaintiff knew that the defendant was running trains of limerock cars. These trains were running at irregular times—sometimes before a pas-

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senger, sometimes after, and sometimes, with a greater interval, between regular cars. And, in any event, the defendant had the right to run cars when he chose, and it was the duty of the plaintiff to exercise some care to look out for them. He could not be entirely inattentive.

3. It being demonstrably clear, in our judgment, that the plaintiff was guilty of contributory negligence, the verdict in his favor is wrong, and must be set aside, unless it appears further that after the plaintiff's negligence, and independent of and distinct from any prior negligence of its own, the defendant was negligent, and that this negligence was the proximate cause of the plaintiff's injury. In other words, the plaintiff must show that at some point of time, in view of the entire situation, including the plaintiff's negligence, the defendant was thereafter culpably negligent, and its negligence the latest in the succession of causes. In such case the plaintiff's negligence would not be proximate cause of the injury. If the evidence justifies that conclusion, we must assume that the jury adopted this view, for in no other way can the verdict be reconciled with law.

As already stated, in the consideration of the defendant's negligence, we think the jury were authorized to find that during the whole time the horse and wagon of the plaintiff were passing from the corner of the house to the track they were in plain sight of the brakeman on the front car of the train; that the plaintiff's horse was walking slowly, while the train was moving rapidly; that the plaintiff himself was out of sight all of the time, and gave no sign that he was aware of the approach of the train. And if, after the brakeman, whose duty it was to watch as well as to brake, came in sight of the team, he saw the team approaching the track, and saw the driver was apparently negligent, inattentive, or ignorant of the train, neither stopping for the train to pass, nor apparently endeavoring to cross before the train, and if at such a time and under such conditions there was apparent danger of a collision by reason of the plaintiff's negligence, and if there was then time to stop the train, it was unquestionably the duty of the brakeman then, by signaling and by braking, to stop the train.

But even if the brakeman, seeing the situation, failed seasonably to take the necessary steps to prevent a collision, which was apparently not only likely to happen, but all the more likely to happen, and which probably would happen, because of the apparent negligence or ignorance of the plaintiff, was his failure the proximate cause of the plaintiff's injury? Was his negligence in that respect subsequent to and independent of the plaintiff's contributory negligence? We are constrained to say that it was not. It was contemporaneous, not subsequent. It operated to produce the result in connection with the plaintiff's negligence, and not independently of it. The plaintiff's negligence actively con-

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tinued from the corner of the house to the point of collision. It was operative to the last moment, and contributed to the injury as a proximate cause. It is not like the case of one who, by his own prior negligence, has merely put himself in a position of danger, as in *Atwood v. Railway Co.*, 91 Me. 399, 40 Atl. 67, and *Ward v. Railroad Co.*, 96 Me. 145, 51 Atl. 947, in which cases the distinction is well illustrated. The plaintiff not only negligently put himself in a place of peril, but continued negligently to move on to the catastrophe until it happened. The language of the doctrine of prior and subsequent negligence implies that the principle is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous. It was so stated, and the distinction was pointed out, in *Ward v. Railroad Co.*, supra, where the court used this language: "It is not enough that the defendant might, by the exercise of due care on his part, have avoided the consequences of the plaintiff's negligence, when that negligence is contemporaneous with the fault of the defendant. But, if the plaintiff's negligence is so remote as not to be a proximate cause contributing to the injury, then a defendant's failure to exercise due care to avoid the consequences of the plaintiff's earlier and remote negligence, when by the exercise of such care they could have avoided, will render the defendant liable." *Rider v. Syracuse R. T. Ry. Co.*, 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; *Fritz v. Railway Co.*, 105 Mich. 50, 62 N. W. 1007; *O'Brien v. McGlinchy*, 68 Me. 552.

Motion for new trial sustained.

HUGHES v. CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of Wisconsin, June 10, 1904.)

[99 N. W. Rep. 897.]

Personal Injuries—Duty to Maintain Crossing in Safe Condition.*

In an action against a railroad company for personal injuries alleged to have been caused by plaintiff's getting his foot caught in a defective street crossing, so as to hold him until he was struck by a train, a charge that it was the duty of defendant to maintain its crossing in a

*See *Chicago, R. I. & P. R. Co. v. Sporer* (Neb.), 7 R. R. R. 646, 30 Am. & Eng. R. Cas., N. S., 646 (care required of railroad company in construction); *State v. Young* (N. J.), 10 R. R. R. 559, 33 Am. & Eng. R. Cas., N. S., 559 (duty of street railway to provide safe means of crossing railroad); *Town of Clarendon v. Rutland R. Co.* (Vt.), 6 R. R. R. 1, 29 Am. & Eng. R. Cas., N. S., 1 (duty to maintain crossings); *Yazoo & M. V. R. Co. v. Watson* (Mass.), 7 R. R. R. 880, 30 Am. & Eng. R. Cas., N. S., 880 (railroad was liable on account of dangerous approaches whether road crossing tracks was public or private); *Denison & P. S. Ry. Co. v. Foster* (Tex.), 3 R. R. R. 576, 26 Am. & Eng. R. Cas., N. S., 576 (degree of care required in maintaining bridge); *Baldwin v. Boston & M. R. R.* (Mass.), 2 R. R. R. 607, 25 Am. & Eng. R. Cas., N. S., 607 (duty to maintain railing where right of way over path has been acquired by prescription); *Smith v. Missouri, K. & T.*

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reasonably safe condition for travel, including foot passengers as well as vehicles, and to exercise reasonable and ordinary care to keep the crossing in a state of repair and reasonably safe for public use, was correct and sufficiently specific.

Same—Crossings—Notice of Defect.

Where the jury found specially that a railroad street crossing was defective, and it appeared that the defect, if any, was the result of wear and use, and plainly to be seen by any person who went near it, it was not reversible error to direct the jury to answer another question, as to whether the railroad company had notice of the defect, in the affirmative.

Accident at Crossing—Duty to Maintain Lookouts.†

In an action against a railroad company for personal injuries alleged to have been caused by plaintiff's getting his foot caught in a defective street crossing, so as to hold him until he was struck by an approaching train, the court charged that it was defendant's duty, as its train approached the crossing, to keep a careful lookout, but that failure to constantly look ahead was not necessarily negligence, and that failure to see plaintiff before he was injured did not necessarily indicate that defendant was negligent, but that, before the jury were justified in finding defendant negligent in not keeping a lookout, they must find that its trainmen failed to exercise that degree of care which men of ordinary intelligence and prudence engaged in the same employment would have exercised in similar circumstances: *held* to substantially cover the question, so that the refusal of other instructions was not error.

Same—Issues—Submission.

In an action against a railroad company for personal injuries, plaintiff's allegation that his foot became caught in a defective street crossing, so as to hold him until he was struck by a train, was denied by the

Ry. Co. (Mo.), 3 R. R. R. 599, 26 Am. & Eng. R. Cas., N. S., 599 (duty to provide crossing where land within city limits, under Kansas statute requiring railroad companies to fence and provide farm crossings where road runs through cultivated lands); *Smith v. Pennsylvania R. Co.* (Pa.), 1 R. R. R. 323, 24 Am. & Eng. R. Cas., N. S., 323 (liability of railroad for defect in design of a bridge constructed under agreement between it and borough council); *Gulf, C. & S. F. Ry. Co. v. Sandifer* (Tex.), 4 R. R. R. 387, 27 Am. & Eng. R. Cas., N. S., 387 (liability of railroad in city on account of dangerous approaches to bridge); *Newport News & O. P. Ry. & Electric Co. v. Bradford* (Va.), 4 R. R. R. 106, 27 Am. & Eng. R. Cas., N. S., 106 (liability of street railway for personal injury caused by pile of snow); note, 7 Am. & Eng. R. Cas., N. S., 623 (adequacy of crossings); note, 18 Am. & Eng. R. Cas., N. S., 668 (duty of railroad to construct crossing over highway subsequently laid out); note, 10 Am. & Eng. R. Cas., N. S., 510 (duty to keep in safe condition); note, 7 Am. & Eng. R. Cas., N. S., 623 (duty to construct and maintain); note, 16 Am. & Eng. R. Cas., N. S., 605 (duty to restore highway); *Board of Com'rs, etc. v. Duluth, etc., R. Co.* (Minn.), 6 Am. & Eng. R. Cas., N. S., 779 (duty to construct and maintain); *City of Charlottesville v. Southern Ry. Co.* (Va.), 16 Am. & Eng. R. Cas., N. S., 600 (duty to construct overhead bridge in street a continuing duty); *Commonwealth v. Louisville & N. R. Co.* (Ky.), 18 Am. & Eng. R. Cas., N. S., 663 (duty to construct and maintain highway crossing where highway is laid over railroad); *Bush v. Delaware, L. & W. R. Co.* (N. Y.), 21 Am. & Eng. R. Cas., N. S., 516 (duty to restore highway); *State v. Burlington, C. R. & N. Ry. Co.* (Iowa), 7 Am. & Eng. R. Cas., N. S., 610 (duty to construct farm crossings); *Willingham v. Macon & B. Ry. Co.* (Ga.), 21 Am. & Eng. R. Cas., N. S., 340 (duty to maintain private crossing built by company).

†See foot-note appended to *Louisville & N. R. Co. v. Dick* (Ky.), 12 R. R. R. 314, 35 Am. & Eng. R. Cas., N. S., 314, where all the preceding authorities in this series are collected.

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answer, and this issue was not specifically submitted to the jury, but special interrogatories required the jury, if they found that the crossing was defective, and the defendant guilty of a want of ordinary care in not discovering the plaintiff and stopping its train, to find whether the insufficiency of the crossing and the want of ordinary care were the proximate cause of plaintiff's injury; and the court charged that, before the jury could find that the insufficiency of the crossing was the proximate cause of the injury, they must find that there was a depression or hole at the place where plaintiff claimed he was injured, and that his foot was caught and held there until he was struck by the train, and must further find that the depression or hole was such that a person of ordinary intelligence ought, by inspection, to have foreseen that it might probably result in a personal injury to another; it not being enough that the injury was the result of the insufficiency of the crossing, unless it was also a probable result. This instruction was substantially the same as requested by defendant, and the jury answered the question in the affirmative: *held*, that the jury must necessarily have found that plaintiff's foot became caught and held until he was struck by the engine.

Witnesses—Examination before Trial—Presence of Deponents in Court—Depositions.

Under Rev. St. 1898, § 4096, as amended by Laws 1901, p. 328, c. 244, providing originally that, where a corporation is a party, the president or managing agent may be examined before trial, and, as amended, extending the right to examine so as to include the agent or employee of the corporation, depositions of mere employees of a defendant corporation, taken before trial, are not admissible, where deponents are present at the trial, subject to be called and examined as witnesses.

Trial—Misconduct of Counsel.

Plaintiff's counsel, on being told by the court that his action in reading to the jury from a judicial opinion was improper, and after a request by defendant that the court advise the jury to disregard such argument, said: "It don't seem to me it is right to direct the jury to disregard that which is the law. It does not seem to me that the court ought to direct the jury to disregard that authority. If I happen to make an argument which is in the language of, or in the same line of, the Judges of the Supreme Court, I don't think I ought to be cross-examined as to where I got it:" *held*, that plaintiff's counsel was guilty of abuse of privilege.

Appeal from Circuit Court, Douglas County; A. J. Vinje, Judge.

Action by Thomas Hughes, by guardian ad litem, against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. From a judgment for plaintiff, defendant appeals. **Reversed.**

This is an action to recover damages for personal injuries sustained by being struck by an engine of the defendant while crossing Ogden avenue, in Superior. Issue being joined, and trial had, the jury returned a special verdict to the effect: (1) That the defendant's crossing at the time when, and place where, the plaintiff claims he was injured, was insufficient for public use. (2) That the defendant did have notice of such insufficiency, so that, by the exercise of reasonable diligence, it might have remedied it before plaintiff was injured. (3) That the defendant was guilty of a want of ordinary care in not discovering the plaintiff and stopping

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the train in time to prevent the accident. (4) "Question 4. If your answer to the first question is 'Yes,' and your answer to the third question is 'No,' then was such insufficiency of the crossing the proximate cause of plaintiff's injury?" No answer. "Question 5. If your answer to the first question is 'Yes,' and your answer to the third question is 'Yes,' then were such insufficiency of the crossing, and want of ordinary care on the part of the defendant in not discovering plaintiff in time to prevent the accident, the proximate cause of plaintiff's injury? Answer. Yes." (6) That the plaintiff was not guilty of any want of ordinary care that contributed to produce his injury. (7) That \$2,000 will compensate plaintiff for the damage he has sustained by reason of the injury complained of. From the judgment entered upon that verdict in favor of the plaintiff for the amount stated, the defendant brings this appeal.

It appears that at the place in question the defendant's main track ran east and west, crossing Tower avenue, Ogden avenue, and John avenue at right angles; that Tower avenue was the next street west of Ogden avenue, and that John avenue was the next street east of Ogden avenue; that the defendant's side track, which crosses Tower avenue a little north of the defendant's main track, gradually approaches the main track as it goes east on Tower avenue until it is brought in connection with the defendant's main track at or near the easterly line of Ogden avenue. It also appears that about 7 o'clock on the evening of July 18, 1902, the plaintiff, a boy 15 years and 5 months of age, passed south over such tracks of the defendant on Ogden avenue; that, soon after, he turned and went north on Ogden avenue; that, upon reaching the defendant's main track, he claims, his left foot became caught between the heel of the pilot and the planking of the crossing, and by the defendant's locomotive coming from the west he was injured, for which he brings this action.

Pierce Butler and S. L. Perrin, for appellant.

W. P. Crawford and W. D. Dyer, for respondent.

CASSODAY, C. J. (after stating the facts). The defendant claims that a verdict should have been directed in favor of the defendant on several grounds. Among other things, it is claimed that the finding of the jury to the effect that the defendant's crossing was insufficient for public use at the time and place where the plaintiff claims to have been injured is not sustained by the evidence, but is contrary to the law and the evidence, and that the court should have changed the answer of the jury to the first question submitted from the affirmative to the negative. After referring to the difficulty of describing the place where it is claimed that the plaintiff's foot became caught, the same counsel say, in effect, that the crossing was constructed by the laying of planks outside of and between the rails of this track; that on

the outside of the rail of the main track the plank was brought into close contact with the rail, and was about the same height as the top thereof; that there was maintained at the crossing an alarm or warning bell, which was rung on the approach of trains, by electric connections; that in the center of the street (Ogen avenue), where the plaintiff claims his foot was caught, there was a joint between two rails; that, to operate the bell, it was necessary to insulate this joint; that this was done by means of a so-called Weber joint, which was two feet long; that on the inside of the rail of the main track, to furnish a flangeway for the passage of wheels of locomotives and cars, there was placed an inverted rail; that the rail of the track—stock rail—weighed 80 pounds to the yard; that the inverted rail was a 60-pound rail, and was so placed that the ball or top thereof was placed against the inside of the web of the stock rail; that the upper side of the ball of the inverted rail was close against the bottom of the ball of the stock rail, and the bottom edge of the base of the inverted rail rested upon boards lying upon the tops of the ties, and the top edge of the base of the inverted rail was thereby brought practically even with the top of the plank of the crossing, and very slightly below the top surface of the ball of the stock rail; that the end of the inverted rails extended to within one foot of the ends of the Weber joint; that it is claimed by the plaintiff that he was caught at the space between the east end of the Weber joint and the west end of the east inverted rail; that in the spaces, each of which was a foot long, between the inverted rails and the ends of the Weber joint, there had been fitted blocks extending down to the base of the stock rail, and up as high as the top of the Weber joint at one end, and a little higher than the web of the inverted rail at the other end, of the block, and it is at the place where one of these blocks (the most easterly) was placed that the plaintiff claims that his foot became caught and fastened. The evidence is voluminous. No useful purpose could be served by giving it in detail. There is certainly evidence tending to prove that the plaintiff's foot got caught as he claims. He testified to the effect that, as he was going north across Ogden avenue, his right foot got caught pretty near the middle of the street; that he had on shoes in a wornout condition, with loose soles; that there was a hole there on the track, between the rail and the plank, 3 feet long and from 3 to 5 inches wide and 4 or 5 inches deep; that he did not notice the hole before he got stuck there, nor afterwards; that, when he got his foot caught there, the train was standing still on the same track, between 65 and 70 feet west from him; that the plank was splintered off—clear off (not clear down to the bottom, but clear down as low as the top of the Weber joint, or a little higher); that he was not caught against the inverted rail by the side of his foot; that the inverted rail might have had something to do

with catching him; that he did not know whether it did or not, but that it was there. A witness for the plaintiff testified, among other things, to the effect that the surface of the street next to the south rail was straight, or rather smooth; that the condition of the surface north of the south rail, east of the Weber joint, was that there was a hole there; that he did not measure it, but should say that it was probably 12 or 15 inches long and 2½ or 3 inches wide, and, from the top of the rail that the train runs on, was down about 2 or 2½ inches; that at the hole the plank was lower than the top of the rail; that he thought it was worn some—more at the hole than it was where the Weber joint protected the edge of the plank; that possibly it was worn off about an inch. Another witness for the plaintiff, and a boy about his age, who was with him at the time, testified to the effect that he saw the plaintiff when he started to go across the Omaha tracks; that he at first went south, and then, when he got around over there, he went to turn round, down towards the center of the street, and when he got there he turned around and looked for the other boys, and his foot slipped down, and got down between the plank and rail, and got caught there; that at that time the train was standing still, west of Ogden avenue; that after the plaintiff was caught, and before the train struck him, he was waving his hand and trying to get out; that he was facing west when he got caught; that the witness saw the train start up, and come along and strike the plaintiff, and he rolled over, and the train dragged him about eight feet; that the plaintiff got up and tried to walk, and fell down; that the witness was on the north side of the track, and he saw the man in the cab on the right-hand side, as he looked west, looking toward Tower avenue; that, after the plaintiff was struck, he noticed the place where he was caught—a kind of hole between the rail and plank on the north side of the rail, near the center of the street. Without further reference to the mass of evidence bearing upon the question, we must hold that the evidence is sufficient to sustain the finding of the jury above mentioned. Nor do we think there was any reversible error in charging the jury upon that question to the effect that it was the duty of the defendant to maintain its crossing at the place in question in a reasonably safe condition for public travel, including foot passengers as well as vehicles, and to exercise reasonable and ordinary care in keeping the same in a state of repair, and reasonably safe for public use. Nor was there any reversible error in refusing to charge to the contrary, or more specifically.

2. The answer to the second question, directed by the court, was necessarily conditioned upon the answer of the jury to the first question submitted, and was to the effect that if they found the defendant's crossing, at the time and place in question, insufficient for public use, then they should find

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that the defendant had "notice of such insufficiency, so that by the exercise of reasonable diligence it might have remedied it before plaintiff was injured." In other words, the jury were thereby instructed that, if they so found the defendant's crossing insufficient, then, in law, the defendant had due notice of such insufficiency. In view of the fact that it appears from the undisputed evidence that such insufficiency, if any, was the result of the wear and use of the structure in question, and that such structure was plain to be seen by any person who went near it, we cannot say that there was any reversible error in the direction so given.

3. By the third question submitted, the jury were called upon to determine whether the defendant was guilty of a want of ordinary care in not discovering the plaintiff and stopping the train in time to prevent the accident. Their answer was in the affirmative. Counsel claim that such finding is not sustained by the evidence, but is contrary to the evidence, and that it was error for the court not to change the answer of the jury from the affirmative to the negative. The question was properly for the jury. It was fairly submitted to them in language as favorable as the defendant had the right to expect. Among other things, the jury were instructed upon that question that "it was the duty of the defendant, as its train approached Ogden avenue, to keep a careful lookout ahead, or in the direction in which the train was moving. But the failure of the persons in charge of defendant's train to constantly look ahead was not necessarily negligence or want of ordinary care. The failure of such persons to have seen the plaintiff prior to the time he was injured by the engine does not necessarily indicate that defendant was negligent or guilty of any want of ordinary care." And again: "Before you are justified in finding the defendant guilty of a want of ordinary care in not keeping a careful lookout, you must find that its trainmen failed to exercise that degree of care which men of ordinary intelligence and prudence, engaged in the same employment, would have exercised under the same or similar circumstances." Other instructions were given in the same line. The instructions given substantially covered the question, and there was no reversible error in refusing to give other instructions on that question.

4. It is claimed that the question at issue, as to whether the plaintiff's foot became caught and fastened and held until injured, was not determined by the verdict. The amended complaint alleged, in effect, that the plaintiff's foot became caught and fastened in and between an open space existing between one of the rails and a defective, broken, and splintered plank on the side thereof, so that he was unable to immediately extricate the same or get across the railroad track, and that while in that condition the defendant's engine was suddenly and unnecessarily and negligently, and without

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warning, started and propelled over, upon, and across Ogden avenue, striking the plaintiff's foot with the pilot and the wheels of the engine, causing the injuries complained of. The answer put such allegations in issue by denials. This court has repeatedly held that it is the duty of the trial court to submit to the jury the particular physical facts directly put in issue by the pleadings, when properly requested to do so. *Lee v. C., St. P., M. & O. R. Co.*, 101 Wis. 352, 77 N. W. 714; *Jenewein v. Town of Irving (Wis.)* 99 N. W. 346, 347. But the court has often held that the form of such special verdict is largely in the discretion of the trial court. *Id.* The question recurs whether the fact so put in issue was determined by the verdict of the jury. There is no claim that it was specifically submitted to the jury. But it is contended that the fourth and fifth questions submitted to the jury, and the charge of the court upon those questions, required the jury necessarily to determine whether the plaintiff's foot became so caught, fastened, and held until struck by the engine. Those questions are given in full in the foregoing statement. By the fourth question, the jury were required, in case they found the defendant's crossing to be insufficient, and that the defendant was not guilty of negligence for failure to keep a lookout, to determine whether such insufficiency of itself was the proximate cause of the plaintiff's injury. After defining "proximate cause," the court charged the jury, under that question, that, "before you can find that the insufficiency of the crossing was the proximate cause of plaintiff's injury, you must, under the evidence in the case, find that there was some depression or hole at the place where plaintiff claims he was injured; that his foot was caught and held fast in such depression or hole until he was struck by defendant's train; and you must further find that such depression or hole was of such a character that a person of ordinary intelligence and prudence ought, by an inspection before the accident, reasonably to have foreseen might probably result in a personal injury to another. It is not enough that the injury was the natural result of the insufficiency of the crossing, but it must also have been a probable result—a result likely to follow from the condition of the crossing." These instructions were substantially in the language requested by counsel for the defendant. But the jury did not answer the fourth question so submitted, for the simple reason that by the terms of the question they were relieved from doing so by finding, in answer to the third question, that the defendant was guilty of negligence by failing to keep a lookout. But by the answer to the fifth question the jury necessarily found that such insufficiency of the crossing and such failure to keep a lookout were together the proximate cause of the plaintiff's injury. After explaining the difference between this question and the fourth question, the court instructed the jury upon this question that "what is meant by the term 'proxi-

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mate cause,' and what you must find in order to declare a condition, act, or failure to act, resulting from a want of ordinary care, the proximate cause of an injury, you have just been instructed under the previous question; and you will consider such instruction repeated here." In obedience to such instructions, the jury necessarily found, in answer to the fifth question, as essential to the proximate cause mentioned, that the plaintiff's foot became so caught, fastened, and held until struck by the engine. It may be that the question might have been more appropriately considered and determined under the question submitted as to contributory negligence. But the defendant, having requested its consideration under the other questions mentioned, is in no position to complain on that ground. Certainly the question was susceptible of being considered under the broad scope of the question of proximate cause. *Jenewein v. Town of Irving (Wis.)* 99 N. W. 346, 348.

5. November 29, 1902, under section 4096, Rev. St. 1898, the plaintiff examined J. P. Cleary, who was the conductor of the train in question at the time of the accident, and also Robert G. Wilson, who was the engineer on the locomotive in question at the time of the accident. At the time of the trial, in June, 1903, and when the plaintiff offered in evidence the depositions of those two witnesses so taken under section 4096, the defendant objected to the same on the ground that both of such witnesses were then and there present in the court; and it appears in the record that they were both, in fact, then and there present in the courtroom. The court overruled the objection, and the defendant excepted. This court held 20 years ago, and repeatedly since, that the section of the statute under which these depositions were taken "was intended as a substitute for a bill of discovery," but that "the examination of a party under" that section was "not limited to the cases in which a discovery might have been had in equity." *Cleveland v. Burnham*, 60 Wis. 16, 17 N. W. 126, 18 N. W. 190; *Kelly v. C. & N. W. Ry. Co.*, 60 Wis. 480, 19 N. W. 521; *Whereatt v. Ellis*, 65 Wis. 639, 27 N. W. 630, 28 N. W. 333; *Meier v. Paulus*, 70 Wis. 165, 170, 171, 35 N. W. 301; *Frawley v. Cosgrove*, 83 Wis. 441, 53 N. W. 689; *Schmidt v. Menasha Wooden Ware Co.*, 92 Wis. 529, 66 N. W. 695. In *Meier v. Paulus*, *supra*, Mr. Justice Taylor said: "The very object of the old bill of discovery was to procure evidence against the opposite party, to be used on the trial of an action; and it was never held that the answer of the party to the bill would not be used against him if he appeared at the trial of the action in aid of which it was taken, and was willing to submit himself to an examination in such action. * * * The examination of a party is in the nature of an admission, so far as his answers are material to the issues in the action, and such admissions are always admitted as original evidence against him." Subsequently to

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the Revision of 1878 the scope of the section was enlarged so that, "in case a private corporation be a party, the examination of the president, secretary or other principal officer or general managing agent of such corporation" might be taken by deposition at the instance of the adverse party. Section 4096, Rev. St. 1898. By a recent statute the section has, in terms, been extended to the "agent or employee" of such corporation or of such adverse party. Chapter 244, p. 328, Laws 1901. Neither of the witnesses in question was an officer of the defendant, nor in any sense a party to this action. On the contrary, each was a mere employee in the capacity mentioned. Assuming that their depositions were rightfully taken under the statute cited, the question recurs whether it was error to allow the same to be read in evidence on the trial against the objection of the defendant, when both witnesses were then and there present in court, subject to be called and examined as witnesses in the ordinary way. Certainly there is no adjudication of this court justifying such admission under the circumstances mentioned. The cases cited are to the effect that such "deposition of a party" so taken "is admissible on the trial as original evidence against him, although he is present at the trial," on the ground that such "examination of a party is in the nature of an admission so far as his answers are material to the issues in the action, and such admissions are always admitted as original evidence against him." *Meier v. Paulus*, supra. At the time of Blackstone the want of power to examine witnesses abroad was troublesome to courts of law, but he said it might "be done indirectly at any time, through the channel of a court of equity, but that such practice had never been directly adopted as the rule of a court of law." 3 Black. Com. 383. Mr. Greenleaf discusses at length the question of taking the testimony of absent witnesses by depositions, and, among other things, says, in effect, that "the court of chancery has always freely exercised this power" of taking depositions in such cases; that the inconvenience to courts of law was remedied by statutes in England and this country; and finally concludes that "depositions thus taken may be used at the trial by either party, whether the witness was or was not cross-examined, if it shall appear, to the satisfaction of the court, that the witnesses are then dead, or gone out of the United States, or more than a hundred miles from the place of trial, or that by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court." 1 Greenl. Ev. §§ 320-322. He also says, in effect, that the statutes giving such right to take testimony by depositions, "being in derogation of the common law," must be strictly construed. 1 Greenl. Ev. § 323. To the same effect, 9 Am. & Eng. Ency. Law (2d Ed.) pp. 298-300. Mr. Weeks, in his work on the Law of Depositions, gives similar views, and, among other things, says that "deposi-

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tions are a species of evidence of a secondary character, admissible where the viva voce testimony or examination of the deponent is not attainable." Sections 4-6. Such was the common law when our Constitution was adopted, and that declares that "the testimony in causes in equity shall be taken in like manner as in cases at law, and the office of master in chancery is hereby prohibited." Section 19, art. 7, Const. Wis. This provision seems to recognize the rule of the common law for the taking of testimony "in cases at law," and to require that the "testimony in causes in equity shall be taken in like manner as in cases at law." The question was not squarely involved in *Noonan v. Orton*, 5 Wis. 60, 61, but the court there said that: "We have no doubt that each party to a suit in chancery is, under our Constitution, entitled to have his witnesses examined in open court, subject, of course, to the occasional exceptions provided for in cases at law. He may, perhaps, be entitled, if he demands it, to have the witnesses of the adverse party so examined, subject to the like occasional exceptions." Such expressions were fully sanctioned in the later case of *Brown v. Runals*, 14 Wis. 693, where it was held that, under the constitutional clause in question, "a party to an action such as was formerly denominated equitable is entitled to have the testimony in the case taken in open court, subject to the same exceptions as are allowed by law in actions such as were formerly denominated legal." That was an action in equity, and it was reversed because it was referred to take the testimony against the objection of the defendant. After referring to the clear and terse language of the provision of the Constitution in question, it is said in the opinion of the court that: "How is testimony taken in actions at law? With few exceptions, it is taken by the examination of witnesses on the trial before the court and jury. This is the almost universal practice of taking testimony in common-law cases. And the advantages of this method of investigating facts, where the witnesses are orally examined, and where their appearance, manner, and conduct in giving their testimony can be seen by the court and jury, are too obvious to need comment. * * * It was the benefit of this system of taking testimony which the framers of the Constitution intended to secure to the parties in equity cases." Page 698. That opinion was reaffirmed a few months afterwards, and it was held that an act of the Legislature requiring all testimony in a certain class of equity cases to be taken before a referee was void, among other reasons, because it deprived the party of his constitutional right to have his witnesses examined in open court. *Oatman v. Bond*, 15 Wis. 20, 27. We must hold that it was error to allow the depositions to be read against the objections of the defendant.

6. It appears that, in arguing the case to the jury, counsel for the plaintiff read a portion of the opinion of this court in

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Valin v. M. & N. R. Co., 82 Wis. 1, 51 N. W. 1084, 33 Am. St. Rep. 17, changing the same so as "to correspond with the facts in this case." He was then told by the court that the reading of such extracts was entirely improper. Some controversy was then had as to just what it was read from the opinion, and the counsel making the statement thereupon withdrew the same. Counsel for the defendant then requested the court to advise the jury to disregard such statement. Thereupon the following statements were made—partly by one counsel for the plaintiff, and partly by the other: "It don't seem to me it is right to direct the jury to disregard that which is the law. It does not seem to me that the court ought to direct the jury to disregard that authority. If I happen to make an argument which is in the language of, or in the same line of, the judges of the Supreme Court, I don't think I ought to be cross-examined as to where I got it." In response to such statements, the court said: "I am rather surprised at counsel for plaintiff; both of them taking this position upon a question which has been ruled upon so often by our Supreme Court as to be a matter of common knowledge." Certainly counsel for the plaintiff abused their privilege in reading from the opinion of this court, and making the statements which followed. No attempt is made to justify such conduct. The claim is that such "arguments" of counsel were not excepted to by counsel for the defendant. Exceptions are supposed to be taken to the rulings of the court upon objections made by counsel. Here the rulings of the court as to those matters were in favor of the defendant. The abuse of privilege consisted in persistently overriding the rulings of the court. In the way the question is presented, and if this were the only ground of reversal, we might not be inclined to disturb the judgment, but we trust counsel will hereafter refrain from such conduct.

Other questions are discussed, but none of them seem to be of sufficient importance to call for the consideration of this court.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

FEITL, v. CHICAGO CITY RY. CO.

(Supreme Court of Illinois, Oct. 24, 1904.)

[71 N. E. Rep. 991.]

Accident on Track—Witnesses—Competency of Motorman.

Since a judgment against a street railway company for death caused by the alleged negligence of a motorman in an action to which the motorman was not a party would not be evidence against the motorman in a suit by the railway company to recover over against him, such motorman was not interested in the suit against the railway company so as to be an incompetent witness for the defendant therein within

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Laws 1867, p. 183, removing the disqualification of witnesses on account of interest in the event, except (section 2) that a party interested shall not be allowed to testify of his own motion or on his own behalf as against the administrator of a deceased person, etc.

Same—Willful or Wanton Injury—Insufficiency of Evidence—Instruction.

Where, in an action for death of a traveler on a highway in a collision with a street car, every witness to the occurrence testified to the sudden application of the brakes by the motorman before collision, and there was no evidence of any intention or purpose not to discharge any duty incumbent on defendant with reference to the accident, an instruction withdrawing from the jury an issue of willful and wanton injury was proper.

Same—Same—Same—Same.

Where, in an action for death of a traveler in a collision with a street car, there was no evidence of a willful injury, a requested instruction to find for plaintiff, though deceased was guilty of negligence contributing to the accident, if the evidence showed that the motorman managed the car in a wanton and reckless manner, was properly refused.

Negligence and Contributory Negligence.*

In an action for death, an instruction authorizing recovery for mere negligence on the part of defendant's servant, notwithstanding contributory negligence of deceased, was properly refused.

Appeal from Appellate Court, First District.

Action by Josie Feitl against the Chicago City Railway Company. A judgment in favor of defendant was affirmed by the Appellate Court, and plaintiff brings error. Affirmed.

Jones & Lusk, for plaintiff in error.

William J. Hynes, James W. Duncan, and C. Le Roy Brown, for defendant in error.

CARTWRIGHT, J. The plaintiff in error, as adminis-

*As to whether there may be a recovery on account of simple negligence where there was also contributory negligence, see *Illinois Cent. R. Co. v. Jolly* (Ky.), 11 R. R. R. 27, 34 Am. & Eng. R. Cas., N. S., 27; note appended to *Macon, D. & S. R. Co. v. McLendon* (Ga.), 11 R. R. R. 153, 34 Am. & Eng. R. Cas., N. S., 153 (contributory negligence and failure to give statutory signals); *Cox v. Wilmington City Ry. Co.* (Del.), 7 R. R. R. 818, 30 Am. & Eng. R. Cas., N. S., 818; *Richmond Traction Co. v. Martin's Adm'x* (Va.), 9 R. R. R. 817, 32 Am. & Eng. R. Cas., N. S., 817; *Ries v. St. Louis Transit Co.* (Mo.), 10 R. R. R. 676, 33 Am. & Eng. R. Cas., N. S., 676; *Butts v. Atlantic & N. C. R. Co.* (N. Car.), 8 R. R. R. 710, 31 Am. & Eng. R. Cas., N. S., 710; *Edwards v. Central of Georgia Ry. Co.* (Ga.), 9 R. R. R. 120, 32 Am. & Eng. R. Cas., N. S., 120; *Doolittle v. Southern Ry. Co.* (S. Car.), 1 R. R. R. 105, 24 Am. & Eng. R. Cas., N. S., 105; *Knauss v. Lake Erie & W. R. Co.* (Ind.), 4 R. R. R. 170, 27 Am. & Eng. R. Cas., N. S., 170; note, 12 Am. & Eng. R. Cas., N. S., 332 et seq.; *Lea v. Durham & N. R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 765; *Thompson v. Northern Pac. Ry. Co.* (C. C. A.), 13 Am. & Eng. R. Cas., N. S., 651; *McGeary v. Old Colony R. Co.* (R. I.), 14 Am. & Eng. R. Cas., N. S., 764; *Neininger v. Cowan* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 492; *Schweinfurth v. Cleveland, C. C. & St. L. Ry. Co.* (Ohio), 15 Am. & Eng. R. Cas., N. S., 73; *Central of Georgia Ry. Co. v. Forshee* (Ala.), 18 Am. & Eng. R. Cas., N. S., 467; *Bolin v. Chicago, etc., Ry. Co.* (Wis.), 19 Am. & Eng. R. Cas., N. S., 735; *Johnson v. Great Northern Ry. Co.* (N. Dak.), 11 Am. & Eng. R. Cas., N. S., 76; *Little Rock & Ft. S. Ry. Co. v. Smith* (Ark.), 13 Am. & Eng. R. Cas., N. S., 699; *Louisville & N. R. Co. v. Hocker* (Ky.), 23 Am. & Eng. R. Cas., N. S., 522.

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tratrix of the estate of Hynek Feitl, deceased, brought suit in the superior court of Cook county against the defendant in error for wrongfully causing his death. The declaration consisted of five counts, and alleged the ownership and operation by the defendant of a street railway and an electric motor car upon Forty-Seventh street, in the city of Chicago; that Hynek Feitl, on March 3, 1901, was riding in a buggy upon said street, and exercising due care for his own safety, and that said car ran upon and against said buggy and killed him. The first count charged defendant with negligence, generally, in the management of the motor and motor car; the second alleged a failure to ring a bell or give any warning of the approach of the car; the third charged the defendant with carelessly and negligently running the car at a high, reckless, and dangerous rate of speed; the fourth alleged that the servant of defendant in charge of the car failed to keep a strict watch and lookout over the track; and the fifth alleged that the defendant, by its servant, the motorman in charge of the car, recklessly, wantonly, and willfully ran said car against, over, and upon said Hynek Feitl and killed him. The plea was the general issue, and upon a trial there was a verdict of not guilty, with the following special findings of fact: First, that the evidence did not show that the deceased was using ordinary care for his own safety; second, that he was guilty of a failure to exercise ordinary care for his own safety that proximately helped to bring about the injury which caused his death; third, that the injury was caused solely by negligence in the manner in which the horse and vehicle was driven; fourth, that there was no evidence as to who was driving the vehicle. Plaintiff moved for a new trial, and the motion was overruled, and judgment was entered against her for costs. Upon a writ of error from the Appellate Court for the First District the judgment was affirmed, and the writ of error in this case was sued out to review the judgment of the Appellate Court.

The principal questions argued by counsel for plaintiff in error relate to the admission by the trial court of the testimony of the motorman, and the giving of an instruction that there was no evidence of wantonness or willfulness on the part of the defendant, and therefore the jury should disregard the fifth count of the declaration.

At the time of the accident Hynek Feitl and another man were driving east in a buggy on Forty-Seventh street, in the city of Chicago, at about 7:15 o'clock on the evening of March 3, 1901. The men were going eastward, and the evidence tended to prove that the buggy was driven from the north side of the street southeasterly upon the track and across the course of the approaching car. It was in the evening, and there were no street lights, but that fact was not material, for the reason that the motorman saw the buggy when it came upon the track a short distance east of Cali-

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fornia avenue and probably about 50 feet from the car. The motorman applied the brakes, but the car collided with the buggy, and Feitl was thrown out and killed. The car came to a stop just after the collision and before it had passed the deceased.

The only evidence on the part of the plaintiff as to the accident consisted of the testimony of a passenger who was in the car, and who testified that the first thing which drew his attention to the buggy was the jerking from the motorman putting on the brakes; that he was sitting inside, in front, and looking out of the window; that the first thing he saw was the wheels of the buggy about four or six feet ahead of the car, and that he heard no bell. On the part of the defendant, George Pett was called as a witness, and testified that he was the motorman of the car. He was then objected to by the plaintiff as an incompetent witness, because he was liable over to the defendant for any damage he may have caused. The objection was overruled, and plaintiff excepted. The witness then testified as to the speed of the car, the condition of the machinery, the men driving on the track, what he did to stop the car, and the situation of the car and the deceased after his death. The opinion of the Appellate Court was that the trial court erred in ruling on the competency of the witness, but that the other evidence in the case was such that the jury could not reasonably have rendered any other verdict, and the judgment was therefore affirmed.

At the common law one who had a personal interest in the success or defeat of one of the litigant parties was thereby disqualified as a witness. If he had a legal existing interest, however small, he was incompetent to testify. The fact that he had an interest in the question to be decided or a bias on the subject of the suit, or hoped to obtain some benefit from the result of the trial, was no objection to his competency; so that in two actions for the same trespass, or on the same policy of insurance, or similar cases, the defendant in one case was a competent witness for the defendant in the other. It was generally said that if the witness would immediately gain or lose by the event of the suit, or if the verdict could be given in evidence either for or against him in another suit, he was incompetent. Under those rules it was held that a servant who would be liable over to his master was incompetent as a witness where the master was charged with liability for his negligence. The question arose in *Galena & Chicago Union Railroad Co. v. Welch*, 24 Ill. 31, which was an action against a railroad company for damages resulting from the washing away of a culvert. It was held that the engineer who planned and superintended the erection of the culvert was not a competent witness for the company until he had been released by it, because he would be liable over to the company for the consequences of his negligence, and it would therefore be for his interest to defeat the action. It was decided,

in accordance with all the authorities, that the witness, being neither a party nor privy to the record, could not be concluded as to the matters determined by it; that it would not establish any liability against him; and that in an action against him by the railroad company for negligence the record would not be evidence of the fact. In such an action, after the negligence of the witness had been established by other evidence, and it had been proved that the injury resulted from such negligence, the record would be admissible on the question of the damage sustained by the railroad company, although it would not be conclusive on that question. This remote and contingent interest was deemed sufficient to render the witness incompetent unless released. Again, in *Chicago & Rock Island Railroad Co. v. Hutchins*, 34 Ill. 108, where the suit was for negligence in killing stock by an engine, and it was alleged that there was a failure to ring the bell or sound the whistle, as required by law, it was held that the engineer was not a competent witness to testify whether the bell was rung at the crossing where the stock was killed. The decision was upon the ground that the witness would be liable over to the railroad company if it was compelled to respond in damages for his nonperformance of duty.

The record of a judgment is always admissible, even between strangers to it, to prove that the judgment was rendered and for what sum, but it would not be admissible to prove the truth of any fact on which the judgment was founded. On that subject Greenleaf says: "Thus the record of a judgment against the master for the negligence of his servant would be admissible in a subsequent action by the master against the servant to prove the fact that such a judgment had been recovered against the master for such an amount and upon such and such allegations, but not to prove that either of those allegations was true, unless in certain cases where the servant or agent has undertaken the defense, or, being bound to indemnify, has been duly required to assume it." 1 Greenleaf on Evidence, § 404. In those cases the witness would not have been concluded by the event of the suit as to any fact involved in it, and it would not have been admissible to establish liability against him, but the fact that it might have been used against him on the question of damages after his liability had been otherwise established was sufficient to render him incompetent.

After the passage of the act of 1867 (Laws 1867, p. 183) removing the disqualification of witnesses on account of their interest in the event thereof, as parties or otherwise, except in certain enumerated cases, the same question came before the court in *Illinois Central Railroad Co. v. Weldon*, 52 Ill. 290. That was an action by the administrator of Christopher Weldon to recover damages for wrongfully causing his death. An employee of the defendant was rejected as a witness by the trial court until he had been released by the defendant,

on the ground of a liability over. It was said that by the common law and under the authority of *Galena & Chicago Union Railroad Co. v. Welch*, supra, a witness so situated was incompetent prior to the passage of that act, but it was held that the act removed the disqualification and disability, and that the witness should not have been rejected on the ground of interest, or the defendant compelled to execute a release before he was permitted to testify. Since the decision of that case, in 1869, it has always been regarded as establishing the law on the subject, and it has never been held that a servant is incompetent as a witness in an action against his master on account of a liability over in a subsequent action by the master. In the numerous cases which have come to this court since that decision, engineers, firemen, and other employees have testified in behalf of their employers as to the ringing of bells, the speed of cars or trains, and any other matter in issue, and their competency as witnesses has never been disputed. A decision recognized as the law and acquiesced in for so long a time ought not to be overruled unless clearly wrong. The argument against it now is that the witness was not competent because the adverse party sued as administrator, and that the court must have overlooked the provision of section 2 of the act of 1867 that no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein, of his own motion or in his own behalf, when any adverse party sues or defends as the administrator of any deceased person, except in the five classes of cases therein specified. In this case the objection to the testimony of the witness was on the ground that he was incompetent to testify at all, and the ruling of the court was not wrong, even if he was incompetent to testify as to particular things. The witness did in fact testify as to some matters concerning which he was competent under the exceptions, although those matters were not of much importance. Furthermore, there was no exception taken at the time to overruling the motion for a new trial, but the exception was after judgment, both to the decision of the court in denying the motion and to the rendition of the judgment. Exceptions cannot be taken in that way, but each exception must be taken to each ruling or decision as it arises upon the trial. An exception must be taken at the time the decision is made, and the bill of exceptions must show that fact. *East St. Louis Electric Street Railroad Co. v. Cauley*, 148 Ill. 490, 36 N. E. 106.

Waiving, however, those objections to the consideration of the question, we do not think that the decision of the trial court was erroneous. It is not to be presumed that the court, in deciding the case of *Illinois Central Railroad Co. v. Weldon*, supra, overlooked the provisions of the act upon which the decision was based, or that such an inference

arises merely from a failure to comment at length upon the various provisions of the act. The general purpose of the act was to remove disqualifications on the ground of interest, leaving the interest to be shown for the purpose of affecting the credibility of the witness. The court, in the Weldon Case, referred to the fact that the existence of the common-law rule had been regretted by the courts, and approved the enlightened policy which led to the abolition of the rule. It is well known that the rule had been inefficient in obtaining disinterested testimony; that there were numerous ways in which witnesses might be interested in the event of a suit, and yet have no legal interest therein; and that with some witnesses a slight interest would tend to perjury, while with others the greatest interest would not have that effect. The disqualification was, however, retained in certain actions, including suits by administrators as against any party to the action "or person directly interested in the event thereof," except in certain specified cases. The question, therefore, in this case is whether the witness was "directly interested in the event" of the suit.

One who is not a party to a suit may have a direct interest in the event of it, for the reason that it is prosecuted for his benefit, or that the judgment will immediately inure to his advantage. The test of such interest is whether he will either gain or lose by the direct legal operation and effect at the judgment, or that the record will be legal evidence for or against him in some other action. 1 Greenleaf on Evidence, §§ 390, 404. And in the latter section the interest in the record is limited to cases where such record is admitted to prove the truth of the facts upon which the judgment was founded, in order to acquire a benefit or repel a loss. See, also, Starkie on Evidence, 24; 1 Best on Evidence, 137. It is manifest that the record of a suit against the master, which is only admissible to show that a judgment was rendered and the amount of it, is not of that character. If the direct legal effect of a judgment will be to establish a claim against the witness, he has a direct interest in the event of the suit within the meaning of the statute. But that can only be so where the judgment will be evidence against the witness of his liability. As already shown, a judgment against the defendant in this case would be no evidence, in a suit against the motorman, that he had been negligent, or that such negligence was the cause of the accident. In a case where an agent of one party had indorsed payments upon a written contract as having been received by him, it was held that he was incompetent, as a witness for his principal, to testify against the widow and heirs of the other party that he did not receive the money, on the ground that if his principal was defeated he would have an immediate action against the witness for the amount of the payment. Bruner v. Battell, 83 Ill. 317. In that case

there was no dispute or controversy as to the indorsement having been made by the agent, and either he or the other party to the contract was liable to his principal for the amount. In *Butz v. Schwartz*, 135 Ill. 180, 25 N. E. 1007, it was charged that the note sued upon was obtained by fraud and circumvention or was a forgery. The suit was by the administratrix of a deceased assignee, and if the defense was successful the payees would be liable over to the assignee. It was held that the fraud and circumvention or forgery, being the work of two witnesses, if established, would render them liable to the payees of the note, and that a judgment against the plaintiff would be conclusive against them. On that ground it was held that they were "persons having a direct interest in the event of the suit," within the meaning of the statute. If the judgment would be conclusive against them and establish their liability, there can be no doubt that they had a direct interest in the suit. In 1 *Phillips on Evidence*, 66, it is said that at common law witnesses who were neither parties to the record nor had any direct interest in the event of the suit were often rendered incompetent by reason of an indirect interest in the record with regard to some subsequent suit, although they could derive no immediate benefit or disadvantage from the determination of the particular suit. In this case a judgment against the defendant would not be evidence of anything for the purpose of establishing a liability of the witness. It is a fundamental principle that no party can be concluded without being heard, and those only are concluded who are adverse parties, between whom the matter in controversy is adjudicated. A person not having a right or opportunity to make a defense, control the proceedings, examine and cross-examine the witnesses, and appeal from the judgment, if an appeal is allowed by law, or sue out a writ of error, is not concluded by the judgment. 24 *Am. & Eng. Ency. of Law* (2d Ed.) 735. Of course, if the defendant succeeded in this suit, it would have no action over against the witness, because there would be no foundation or basis for a claim; but if it failed, it would be required to prove the liability of the witness in a subsequent action, without regard to the judgment. If the witness should be subsequently sued by the plaintiff for the same wrong, the judgment would be neither evidence for nor against him. He would not be relieved from liability by the judgment. Where one is responsible over to another for whatever may be justly recovered in a suit against the other, and is duly notified of the tendency of the suit and requested to take upon himself the defense of it, and is given an opportunity to do so, the judgment, if obtained without fraud or collusion, will be conclusive in a subsequent suit against him. 24 *Am. & Eng. Ency. of Law* (2d Ed.) 740. In *Drennan v. Bunn*, 124 Ill. 175, 16 N. E. 100, 7 *Am. St. Rep.* 354, it was held that where a person is responsible over to another, and

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he is notified of the pendency of a suit involving the subject-matter of the indemnity and requested to defend it, he is not to be regarded as a stranger to the suit, and any judgment obtained without fraud against the party to be indemnified will be conclusive against the party so notified, whether he appeared or not. The witness in this case was not in that position, and his interest in the event of the suit was only consequential or indirect, as explained by the authorities. The act of 1867 removed the disqualification of witnesses on the ground of interest generally, and, in the case of a suit by an administrator, retained the disqualification only where the witness is directly interested in the event of the suit. We see no reason for overruling the former decision, and conclude there was no error in the ruling of the trial court.

There was no evidence tending to prove wanton or willful conduct on the part of the defendant or any of its agents or servants. Every witness to the occurrence testified to the sudden application of the brakes, and there was no evidence of any intention or purpose not to discharge any duty incumbent upon the defendant. The instruction to that effect was therefore proper.

The trial court refused to give to the jury the twenty-fourth, twenty-fifth, and twenty-sixth instructions which were tendered by the plaintiff. The twenty-fourth directed a verdict for the plaintiff, although the deceased was guilty of negligence contributing to the accident, if the evidence showed that the motorman managed the car in a wanton or reckless manner. It was properly refused for want of any evidence on which to base it. The twenty-fifth was an abstract proposition of law concerning the relative rights of street car companies and persons traveling on the street. It was not error to refuse it for the reason that it was abstract, and it was also inaccurate and misleading. The twenty-sixth authorized a recovery for mere negligence on the part of the motorman, notwithstanding contributory negligence on the part of the deceased. It was properly refused.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

O'BRIEN v. BLUE HILL ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Oct. 17, 1904.)

[71 N. E. Rep. 951.]

Street Railways and Other Users of Streets—Mutual Rights.*

Where the driver of a carriage is lawfully using the portion of the street occupied by the tracks of a street railroad company, neither the company nor the driver is entitled to the exclusive use of that portion

*See foot-note appended to *Mathiesen v. Omaha St. Ry. Co.* (Neb.), 11 R. R. R. 777, 34 Am. & Eng. R. Cas., N. S., 777; foot-notes appended to *Haas v. New Orleans Rys. Co.* (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442.

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of the highway, but each is required to exercise due regard for the rights of the other.

Same—Frightening Teams.†

The persons in charge of a street car are required to take reasonable precautions not only to avoid collision with a vehicle on the track, but also, if possible, to prevent the too sudden approach of the car where the horses attached to the vehicle are seen to be restive, and escaping from the control of the driver.

Same—Same—Sufficiency of Evidence.

In an action against a street car company for personal injuries alleged to have been caused by negligence of defendant's servants in charge of a car in approaching plaintiff's vehicle so rapidly as to frighten the horse, evidence considered, and *held* insufficient to justify submission to the jury of the issue of defendant's negligence.

Exceptions from Superior Court, Suffolk County; Franklin G. Fessenden, Judge.

Action by Francis A. O'Brien against the Blue Hill Street Railway Company. There was verdict for defendant, and plaintiff excepts. Exceptions overruled.

Jas. A. McGeough, for plaintiff.

T. E. Grover and F. J. Squires, for defendant.

BRALEY, J. Though the evidence was conflicting, it appeared from the plaintiff's statement that while he was driving along Washington street, a public way in the town of Canton, it became necessary for him, in order to safely pass another traveler by carriage, to turn from the middle of the street to the right, and drive directly onto the tracks of the defendant's road, located on the easterly side of the way, and as he continued his course and came to a turn in the road he was warned by the vibration of the trolley wire that a car was approaching, and immediately turned to the left, in order to leave the track; but the wheels of his wagon clung to the flang of the rails, and slipped for a short distance; and he then saw for the first time that a car was approaching and "rounded the bend just as I was swinging off the track. I should think the car was about one hundred and fifty or two hundred feet away from me when I first saw it. They came around the bend and were right on top of me almost in a minute. He rang his bell, and next thing I knew my horse got frightened, and I couldn't control her. I could not say how fast the car was going, it came on me so sudden. The man at the brake made a sort of an attempt to stop. I don't know whether he got bewildered, or what happened, but he slipped I should say fifty to seventy-five feet beyond where the accident happened before he came to a full stop." After the gong rang and the car approached nearer, the horse, which previously

†For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to frightening teams, see *Georgia Ry. & Electric Co. v. Joiner* (Ga.), 12 R. R. R. 608, 35 Am. & Eng. R. Cas., N. S., 608.

had been under control, became frightened, then unmanageable, and finally plunged in front of, and just escaped contact with, the car, ran across the street, and came into collision with a telephone pole, the plaintiff was thrown to the ground and hurt, his horse injured, while his wagon was demolished.

If the plaintiff, as a traveler, was found to have obeyed the law of the road in turning to his right to permit another conveyance to pass, then he was in the lawful use of that portion of the street occupied by the tracks of the defendant; and, while neither of the parties had an exclusive use of the highway, each was required to observe a due regard for the rights of the other, and their respective privileges arising from such a concurrent use have been so fully defined by our decisions that no further discussion is now required in the consideration of this case. *Com. v. Temple*, 14 Gray, 69; *Galbraith v. West End Street Railway Co.*, 165 Mass. 572, 43 N. E. 501; *White v. Worcester Consolidated Street Railway Co.*, 167 Mass. 43, 44 N. E. 1052; *Scannell v. Boston Elevated Railway Co.*, 176 Mass. 170, 57 N. E. 341. As the defendant does not claim that the plaintiff's conduct was careless, but confines its argument to the single proposition that the testimony wholly fails to disclose any negligence on its part, the question presented for decision is whether there was any evidence which required a submission of this issue to the jury. In the management of the car the defendant was required to take reasonable precautions not only to avoid a collision, but also, if possible, to prevent its too sudden approach, as this naturally would tend to further excite a horse clearly seen to be restive, and that soon escaped from the control of the plaintiff. But an examination of the evidence discloses that the car was running at a speed of not over "five or six miles an hour" when it came around the bend in the road, and at a point from 250 to 300 feet distant from the plaintiff, and, though the gong was sounded, the plaintiff did not testify that its ringing caused the fright of his horse, while the testimony of the defendant's witnesses that the brake was applied promptly remained uncontradicted. If it was the duty of the defendant's servants to anticipate the fact, shown by common experience, that travelers by carriage also might be using the highway at the same time, and the speed of the car and the skill with which it should be managed and controlled depended upon a proper recognition of these conditions, yet the car does not appear to have been running at an undue rate of speed, or to have been beyond the immediate control of the motorman, for on the application of the brake its speed slackened, and a collision was avoided, though the point at which it was stopped was in dispute. It was said in *Ellis v. Lynn & Boston Railroad Co.*, 160 Mass. 341, 350, 35 N. E. 1127, 1128, which is among the cases relied on by the plaintiff, that: "The motorman is supposed to know that

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his car is likely to frighten horses that are unaccustomed to the sight of such vehicles, while most horses are easily taught after a time to pass it without fear. It is his duty, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse; and it is also his duty in running the car to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams." See, also, *Benjamin v. Holyoke Street Railway Co.*, 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446, *Thompson v. Same*, 170 Mass. 365, 49 N. E. 748, and *Henderson v. Greenfield & Turners Falls Street Railway Co.*, 172 Mass. 542, 52 N. E. 1080. If this rule is applied to the conduct of the defendant's servants in the case at bar, it is plain that upon the discovery of the situation of the plaintiff, and the excitement of his horse, the motive power was turned off, the brake applied, and every proper effort made by them not only to prevent a collision, but to avoid further frightening the horse. As no negligence on the part of the defendant was shown, a verdict was ordered rightly in its favor.

Exceptions overruled.

LITTLE v. SOUTHERN RY. CO.

(Supreme Court of Georgia, June 9, 1904.)

[47 S. E. Rep. 953.]

Injury to Employee—Violation of Penal Statute.

An employee cannot recover damages of a railroad company for an injury proximately caused by his violation of a penal statute or municipal ordinance. The principle is not modified where the employer may have directed the employee to violate the law, or may have sanctioned the continuance of a custom amounting to a contravention of the law.

Same—Application of Rules.

The rules of a railroad company for the government of its employees are not obligatory, as such, upon those who do not know them, and to whom they have not been promulgated.

Same—Contributory Negligence.*

An employee cannot recover of a railroad company if he is negligent, and his negligence appreciably contributes to his injury.

*As to effect of a railroad employee's contributory negligence on his right to recover against the railroad, see foot-note appended to *Schlemmer v. Buffalo, R. & P. Ry. Co.* (Pa.), 10 R. R. R. 240, 33 Am. & Eng. R. Cas., N. S., 240 (contributory negligence and assumption of risk where employee fails to comply with rules or instructions); foot-note appended to *Wrightville & T. R. Co. v. Lattimore* (Ga.), 9 R. R. R. 58, 32 Am. & Eng. R. Cas., N. S., 58 (doing dangerous work in obedience to orders); foot-note appended to *Erie R. Co. v. Kane* (C. C. A.), 8 R. R. R. 423, 31 Am. & Eng. R. Cas., N. S., 423 (violation of rules); *Edwards v. Central of Georgia Ry. Co.* (Ga.), 9 R. R. R. 120, 32 Am. & Eng. R. Cas., N. S., 120 (nonsuit where both negligence and contributory negligence).

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The contentions of the plaintiff as made by the pleadings were fairly submitted to the jury.

Same.

The application of the charge of the court on the subject of contributory negligence to the evidence necessarily controlled the verdict, and the verdict for any minor error of law will not be set aside.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by J. H. Little against the Southern Railway Company. Judgment for defendant, and plaintiff brings error, and defendant assigns cross-error. Judgment on main bill of exceptions affirmed. Cross-bill dismissed.

J. H. Little sued the Southern Railway Company for injuries alleged to have been received from a collision between two switch engines, one of which was operated by him as engineer. About 7 o'clock on the afternoon of July 1, 1902, he was directed to "break up" a train of cars just arrived from the North, in order to make up another for the South. In the performance of this order, it was necessary for him to pull his train to a point on the main line sufficiently far to clear a certain switch, and then push the cars back in a siding from this switch. Plaintiff started out on the main line with about 13 cars, loaded with coal, attached to his engine, and ran down the main line, crossing the track of the Central of Georgia Railroad Company, and stopped his train after the crossing was cleared. The track of the defendant road was down grade after the crossing was reached, and the plaintiff was unable to back his train into the switch intended. He made several attempts to do so, each time pulling his train a little further off to get the "slack," but was unable to push his cars back. Then he started his train down grade towards the passenger depot, running at a speed of about 8 or 10 miles an hour, crossing two streets of the city of Macon without checking his speed, and ran through a railroad culvert, located on an abrupt curve, into a switch engine that was bringing some cars from an opposite direction. In approaching the culvert his view of this switch engine was cut off by the high embankment through which the culvert extended. He contended, and the railway company denied, that he received a signal from the yardmaster to pull his train forward after his ineffectual efforts to back the cars. The evidence offered by the plaintiff tended to show that, in moving his train forward, he was acting under orders from the yardmaster; that the engine collided with was at the time running backward in making a "flying switch," and had no light or outlook on the rear; that the collision was the result of the negligence of the servants in charge of that engine in failing to provide proper warning, and in making a flying switch in opposition to the rules of the company; that, when plaintiff stopped just beyond the railroad crossing, he was signaled to go ahead by the defendant's servant; and that

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the collision was not the result of any negligence on his part. On the other hand, the railroad company offered evidence tending to show that the plaintiff violated the rules of the yard in moving his train so far; that he failed to stop within 50 feet of the track of the Central of Georgia Railroad, an intersecting railroad; that he failed to check the speed of his train when he was crossing the public streets of the city of Macon; and that at the time of the collision he was running his train at a speed of 15 to 20 miles an hour, in violation of the ordinance of the city of Macon which limited the rate of speed to 5 miles an hour. The jury returned a verdict for the defendant, and the plaintiff, by direct exception, brings the case here for review.

John R. Cooper, M. W. Harris, and J. H. Hall, for plaintiff in error.

Dessau, Harris & Harris, for defendant in error.

EVANS, J. 1. Within an hour after the plaintiff began to discharge his duties in shifting the cars, he violated two statutes of the state and a municipal ordinance of the city of Macon. When he ran on the main line with his cars, he failed to observe Civ. Code, § 2234, which required him to stop within 50 feet of the place of crossing the Central Railroad, which was an independent railroad. He did not stop before crossing the Central Railroad, but immediately after clearing the same he brought his cars to a full stop. It was afterwards that he ran his train down in the direction where the collision occurred. Plaintiff in error contends that in no sense was the failure to stop within 50 feet of the Central Railroad crossing a contributing cause of the injury, for the reason that he had crossed the railroad and come to a full stop, and, even if he had been negligent in violating the statute requiring him to stop within 50 feet of the crossing, that, having stopped his train just beyond the crossing, his failure to observe the statute could not have contributed to the injury. On the other hand, the railway company insists that this was a down grade, and, if he had stopped within 50 feet of the crossing, he would have been able to push the cars back into the siding, and that, because of his failure to observe the statute, and in going beyond the Central of Georgia Railroad crossing to a point so far down grade, he was unable to push the cars back, and was guilty of negligence. The court submitted this issue to the jury; instructing them that, unless they believed the failure on the part of the plaintiff to comply with this statute was a contributing cause of the injury, he would not be chargeable with negligence in failing to observe it.

Section 2234 is primarily designed to prevent collisions between the trains on the intersecting roads. Although the plaintiff did not comply with the statute in stopping within 50 feet of the intersecting road, he did bring his train to a

full stop after crossing the track of the Central of Georgia Railroad Company. Relatively to what occurred after crossing that track, the failure to stop before he crossed it was not the proximate cause of the collision. Diligence might have required him to ask for assistance in backing his train, instead of moving further down grade, but his failure to stop his train within 50 feet of the railroad crossing is too remote to be regarded as a contributing cause of the collision with the other engine. But as the jury were instructed that this would not be an act of negligence unless it was found to be a contributing cause of the injury, and as the evidence demanded a finding that the injury proximately resulted from the violation of the statute requiring him to check the speed of his train while approaching a street crossing, and in running faster than was permitted by the municipal ordinance, the submission of this irrelevant issue should not have the effect of vitiating the only verdict which could properly have been rendered under the facts of the case.

After the plaintiff had stopped his train beyond the railroad crossing, and was unsuccessful in his attempts to back the cars, he started forward at a speed estimated by the witnesses as from 8 to 20 miles an hour, crossing two streets in the city of Macon without checking the speed of his train. The court charged Civ. Code, §§ 2222, 2224, requiring an engineer to check the speed of its locomotive within 400 yards of such crossings, so as to be able to stop in time should any person or thing be crossing the track; and in this connection the court instructed the jury that, if they believed that the failure of the plaintiff to observe this statutory requirement was a proximate cause of his injury, he would not be entitled to recover. There are several cases construing these sections of the Code. Their application has been confined to injuries to person or property occasioned by a railroad company at a grade crossing, and in these cases it has been held to be negligence per se not to comply with the statute. There has been no adjudication as to what effect a failure to observe this statute would have upon the engineer in the event he was injured at a point either on or near the crossing. The statute makes it the duty of the engineer, and not of the railroad company, to blow the whistle and check the speed of the train. If he fails to do this as required by the statute, he is subject to indictment for a misdemeanor; and if, in the commission of this criminal act, an injury results which could have been avoided but for the commission of that act, his right to recover from the railroad company will be defeated. 1 Labbatt on Master & Servant, § 362; Missouri Ry. Co. v. Roberts (Tex. Civ. App.) 46 S. W. 270. The same may be said as to the violation of the speed ordinance of the city of Macon, which prohibits the running of trains in that portion of the city at a greater rate than 5 miles per hour. The plaintiff admits that at the time he sus-

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tained the injury the speed of his train was 8 to 10 miles an hour. When he collided with the other engine he was in actual violation of the speed ordinance of that city. He had just passed two street crossings without checking the speed of his train, or attempting to do so. He rushed towards the impending collision in disobedience of the state statute requiring him to check the speed of his locomotive at street crossings, and in disobedience of the municipal ordinance limiting him to a speed of 5 miles an hour. If his injury was caused by reason of a violation of either the statute or the ordinance, he would not be entitled to recover. But he says that he was commanded by the railroad company to disobey both the statute and the speed ordinance, and that, even if there was no express command to that effect, there had been such repeated violations as to amount to custom. It would be contrary to public policy for courts to relieve a citizen of the consequences of his act in violating the law or his duty to society, and it cannot be any defense that some one else either assisted in the offense or commanded him to do it. *Ry. Co. v. Roberts* (Tex. Civ. App.) 46 S. W. 270. It is no justification for one criminally responsible for his conduct that another commanded him to do an act which is inhibited by law. No custom, however universal, could have the effect of repealing a penal statute, and the mere forbearance of the corporation to prosecute for repeated violations of the ordinance would not amount to an implied repeal of the ordinance. *Central R. R. v. Curtis*, 87 Ga. 425, 13 S. E. 757. In *Wallace v. Cannon*, 38 Ga. 199, 95 Am. Dec. 385, a widow of a deceased employee sued the Western & Atlantic Railroad Company to recover damages because of the death of her husband by the alleged carelessness of the employees of the railroad company while her husband was acting as engineer. The defendant pleaded that at the time of the killing the railroad company was engaged in the transportation of insurrectionary troops to fight against the forces of the United States, and that the plaintiff, in propelling the train, was in resistance to the government of the United States. The court there ruled that where two or more parties are engaged in the same illegal transaction, and one is injured by the negligence or carelessness of the other, the courts will not lend their assistance to either party to recover damages. See *Martin v. Wallace*, 40 Ga. 52; *Redd v. Muscogee R. Co.*, 48 Ga. 102. While approving the principle in the last three cases cited, we have serious doubt as to its application in those cases. It follows that, if the railway company either commanded or connived at a violation of the penal law, the plaintiff, who was the actual perpetrator, could not recover of the defendant for an injury traceable to a violation of the statute.

2. The court charged that an employee of a railway company is not bound by any rule, regulation, custom, or usage not communicated to him or furnished to him or spoken or

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told him, and of which he had no knowledge, and of which he could get no knowledge by the use and exercise of ordinary care and diligence. The error assigned upon this charge is that the law does not impose upon the employee the duty of exercising ordinary care in ascertaining the rules of the company. He is only bound by the rules promulgated by the company, and of which he has knowledge. As applied to the evidence, the jury could have understood the charge only to mean that an employee is not bound by any rule of which he had no knowledge, but, if there was furnished him an opportunity to learn the rules, and by the exercise of ordinary care he could have acquainted himself therewith, this would amount to knowledge. This statement of the rule is recognized in *Port Royal Ry. Co. v. Davis*, 95 Ga. 299, 22 S. E. 833; *Carroll v. Ry. Co.*, 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214.

3. In order for an employee of a railroad company to recover damages from the company for an injury received while in its employment, it must appear that he was free from fault. This principle has been stated in many forms. The charge of the trial judge on this subject was modeled on *Prather's Case*, 80 Ga. 427, 9 S. E. 530 (2), 12 Am. St. Rep. 263. The statement of the doctrine that an employee of a railroad company cannot recover if he "immediately or remotely, directly or indirectly, caused the injury or any part of it, or contributed to it at all," has been approvingly cited in *W. & A. R. R. v. Herndon*, 114 Ga. 168, 39 S. E. 911. In *Banking Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613 (2), it was said that "the negligence of the plaintiff, however slight, which contributes in an appreciable degree to the cause of the injury, defeats a recovery." If the negligence of the employee appreciable contributes to the injury, he cannot be free from fault, and, to recover, he must show himself blameless.

4. Complaint is made that the contentions of the plaintiff were not fully submitted in the charge. If the plaintiff desired any further elaboration of his contentions, he should have made an appropriate request. The charge was very elaborate, and covered every material phase of the case, and submitted every substantial issue to the jury.

5. Plaintiff in error did not make a motion for a new trial, but by direct exception complains of the various rulings and charges of the court. When he pursued the latter course, he staked his right to a reversal of the verdict upon strictly legal grounds. The controlling question in the case is the contributory negligence of the plaintiff in violating a penal statute and municipal ordinance. The charge of the court on this subject, applied to the evidence, necessarily controlled the verdict, and any minor errors of law will not have the effect of reversing the verdict.

Judgment on main bill of exceptions affirmed. Cross-bill of exceptions dismissed. All the Justices concurring.

HOLMES v. BIRMINGHAM SOUTHERN R. CO.

(Supreme Court of Alabama, June 16, 1904.)

[37 So. Rep. 338.]

Who Are Passengers—Shipper's Employee.*

Defendant ran its cars to and from a stock-house of T., plaintiff's employer, for the purpose of their unloading, it being agreed between defendant and T. that the cars, after being delivered and unloaded, were to be cleaned out by a servant of T., and the defendant should convey such servant on its cars to the place of unloading: *held*, that plaintiff, in being so conveyed on defendant's cars as such servant of T., was a passenger of defendant, so that the negligence of defendant's engineer, through which plaintiff was injured while being so conveyed, was not that of a fellow servant.

Negligence—Question for Jury.

The questions of negligence, and whether a claim for negligence was settled, are for the jury in a case not so free from doubt but that different minds may draw different inferences or conclusions on the subject whether the evidence is conflicting or not.

Tyson and Sharpe, JJ., dissenting.

Appeal from Circuit Court, Jefferson County.

Action by Peter Holmes, by his next friend, against the Birmingham Southern Railroad Company, for personal injuries. Judgment for defendant, and plaintiff appeals. Reversed.

This action was brought by the appellant, Peter Holmes, by his next friend, against the Birmingham Southern Railroad Company, to recover damages for personal injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendant or its employees. The substance of the several counts of the complaint is sufficiently shown in the opinion. The defendant pleaded the general issue and several special pleas. Among the special pleas were the following: "(4) Further answering each count of said complaint as amended, the defendant says that plaintiff is not entitled to recover in said action, because defendant says that after the committing of the said grievances as aforesaid, and before the bringing of this suit by the said plaintiff against this defendant, on, to wit, the 9th day of April, 1900, the defendant paid to the said plaintiff the sum of thirty dollars for and in full satisfaction and discharge of the said grievances in said declaration mentioned, which said sum of thirty dollars he, the said plaintiff, then and there accepted and received of and from the defendant in full satisfaction and discharge of said grievances, being at the time twenty-one years of age or over. (5) Further answering each count of said complaint as amended, defendant says that, if plaintiff was injured by the negligence of any person, it was the negligence of a fellow servant of plaintiff, and not the defendant; wherefore this defendant says that plaintiff

*See foot-note appended to *Radley v. Columbia Southern Ry. Co.* (Ore.), 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

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cannot recover in his said action." Upon the introduction of all the evidence, the court, at the request of the defendant, gave the general affirmative charge in its favor, to the giving of which charge the plaintiff duly excepted. There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the giving of the general affirmative charge requested by the defendant.

J. A. Estes and W. K. Smith, for appellant.

A. G. & E. D. Smith, for appellee.

HARALSON, J. The complaint consists of 14 counts. The 1st, 2d, 3d, 7th, 8th, 9th and 14th, count upon the simple negligence of the defendant; and the 10th, 11th, 12th and 13th, count upon the wantonness of defendant in inflicting the injury.

There were demurrers interposed to the first 12 counts, but these do not appear to have been acted upon. When counts 13 and 14 were added by amendment, defendant demurred to each of them, and these do not appear to have been passed on. The defendant filed pleas to each count of the complaint, taking issue thereon, and pleaded specially, to counts 13 and 14, setting up the contributory negligence of the plaintiff, which pleas were demurred to, and the demurrers were sustained. It thus appears, there was no plea of contributory negligence in the case at all, and it was tried on each of the counts under the plea of the general issue, and on issue joined on special pleas 4 and 5.

The counts were not drawn under section 1749 of the Code of 1896, known as the "Employer's Liability Act," for injury to the plaintiff by defendant for the negligence of a fellow servant of the plaintiff. The plaintiff was not in the employment of the defendant company, and it is not so alleged. This would have been necessary to sustain the suit under that act. *G. P. R. Co. v. Propst*, 85 Ala. 203, 4 South. 711; *Elliott on Railroads*, § 134.

The plaintiff, as was averred, (and shown by the tendencies of plaintiff's evidence,) was in the employment of the Tennessee Coal, Iron & Railroad Company, another and distinct company from defendant; that the defendant ran its cars to and from a stockhouse of the former company, for the purpose of their unloading; that it was the agreement and rule between the two, that when defendant delivered a car or train load of coke to the other company at said stockhouse, the cars, when unloaded, were to be swept out and cleaned by the said Tennessee Coal, Iron & Railroad Company, by one of its servants who had to ride to the place on one of defendant's cars; that it was the duty of the defendant to convey such servant on its cars to the place of unloading, where it became the duty of such servant to sweep out and clean said cars when unloaded; and in carrying such servant, it was the duty of defendant to do so in the exercise of due care; that

one of the Tennessee Coal, Iron & Railroad Company's servants, who was in the exercise of superintendence entrusted to him over the plaintiff and other hands, ordered and directed plaintiff, as was customary to be done, to go on the cars of defendant for the purposes aforesaid; that the servant of defendant knew that it was the duty of plaintiff when so ordered, to get upon the defendant's cars to go to said stock-house for the purpose stated, and they stopped the cars on the occasion of this accident, for the plaintiff to get on; that in the act of boarding the cars, he caught hold of one of them, and was in the act of ascending the same, when the train, by signal to the engineer by one in charge of it, was suddenly started with such violence and rapidity, that plaintiff was struck by and against a post, which was near and in close proximity to the car, and so known to be by defendant's employees in charge operating the train; and thereby plaintiff was knocked off of the car on to the railroad track and run over, and the injury complained of was inflicted on him. It is averred, that defendant operated said car or train by and through its servants, agents and employees in a negligent and improper manner, which negligence proximately caused the plaintiff's injuries.

The suit was intended to be and is, a common-law action by plaintiff against defendant for the injuries done him. It proceeds upon the theory, that plaintiff was invited upon the train by defendant, for purposes partly its own, and that he was, to this end, a passenger, to whom defendant owed the duty of exercising due care in his transportation; and the fact that the injury resulted from the negligence of one of the defendant's employees, who was in no sense a fellow servant of the plaintiff, did not relieve the company from liability.

The principle arose and was passed on by the Appellate Court of Missouri, in the case of *Mellor v. Missouri P. Ry. Co.*, reported in 10 L. R. A. 36, 105 Mo. 455, 16 S. W. 849, in reference to a mail carrier of the government, where it was said: "That the plaintiff was riding upon the defendant's train by virtue of some contract or agreement between defendant and the federal government touching the carriage and care of the United States mail, was clearly established by the testimony. Defendant's contention, that in such a situation he should be regarded as a servant, we consider too untenable for serious discussion. There was neither allegation or proof on defendant's part that plaintiff was in its employing any capacity, and certainly no such inference fairly arises from any of the facts in evidence. This being so, there is no foundation on which to predicate a defense that plaintiff's injuries arose from any negligence of a fellow servant. The train operators were clearly not such to him. Defendant's duty to him, so far as concerned safe transportation, was as a passenger." Citing *Seybolt v. N. Y. L. E. &*

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W. R. Co., 95 N. Y. 562, 47 Am. Rep. 75; *Yeomans v. Contra C. S. Nav. Co.*, 44 Cal. 71; *Collet v. London & N. W. R. R. Co.*, 16 Ad. & El. N. S. 984; *Hammond v. N. E. R. R. Co.*, 6 S. C. 130, 24 Am. Rep. 467. Mr. Ray in his *Negligence of Imposed Duties*, p. 8, touching mail agent's on trains, which is here applicable, says: "Indeed it will be generally accepted as law, that a United States mail agent on a train in the performance of his duties in charge of the rail, is a passenger, and the railroad company, in an action against it for injury to him while so employed, is not to be relieved from the negligence of its servants on the ground that plaintiff was a fellow servant with them." *Broslin v. K. C. M. & B. R. R. Co.*, 114 Ala. 398, 21 South. 475.

The evidence of plaintiff showed that the post that plaintiff struck was one of the corner posts of the shed to the stockhouse, and was about ten inches from the car in passing, and a man could not go between it and a car; that the defendant's engineer had been running these trains every day, and sometimes twice or more, and he knew how close this post was to the cars; that he always stopped there for some one to get on, to go out and sweep and clean the cars at the stockhouse and had been doing this for a good long time, and Coote McAdory had been having these cars swept and attended to for some months.

The question raised by the fourth plea,—that plaintiff had settled and been paid for this claim, before the commencement of this suit,—has not been noticed in argument on either side. The plaintiff on his cross-examination testified, that a Mr. Williams paid him some money and he touched a pen, but he did not know what it was he signed; that Williams came to his house, about four months after he was hurt, and desired him to go to Birmingham with him, when plaintiff told him he had no money, and Williams said, that was all right, he had money; that Williams carried him to Birmingham and into his office, and said "Touch this pen," and he gave me \$30;" that Williams said, "Peter this company wants to make some kind of settlement with you; they have carried you as long as they can, and no railroad company is under obligations to carry one as long as we have carried you. He then told me to touch that pen, and did not read or explain to me anything that I was signing."

The court gave, at defendant's request, the general charge in its favor.

Under the evidence in the case, we apprehend this was an erroneous instruction. Whether the defendant was or not guilty of negligence in transporting the plaintiff to the stockhouse, or of wantonness in inflicting the injury, and whether or not the plaintiff settled his claim with the company, before suit brought, were questions for the determination of the jury under proper instructions from the court. The rule on the subject has been stated to be, that "in all cases not

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free from doubt, either when the evidence is conflicting, or where it is not, and different minds may draw different inferences or conclusions on the subject, the question of negligence, (or any other question subject, under the evidence, to the same inference) is one of fact for the determination of the jury. It becomes a question of law to be determined by the court, only when the case is so free from doubt as that inference of negligence to be drawn from facts is clear and certain." *Mouton v. L. & N. R. R. Co.*, 128 Ala. 539, 29 South. 602, and authorities there cited.

The case in hand, under the evidence disclosed, falls clearly within this rule.

Reversed and remanded.

TYSON and SHARPE, JJ., dissenting.

WAALER v. GREAT NORTHERN RY. CO.

(Supreme Court of South Dakota, Oct. 19, 1904.)

[100 N. W. Rep. 1097.]

Assault by Employee—Scope of Employment—Liability of Master.*

Where railroad employees were directed to build a snow fence on property not owned by the railroad, and in compliance with a request of the owner one of her servants went to the crew and remonstrated with them, forbade them to erect the fence there, and demanded the removal thereof, whereupon, at the instance of the foreman of the crew, commanding one of his men to "go after" the owner's servant, he was set upon and beaten, the assault was not within the scope of the authority of the railroad company's employee, and hence the railroad was not liable therefor.

Same—Same—Legal Conclusion.

An allegation, in a complaint in an action against a railroad for an assault and battery committed on plaintiff by an employee of defendant, that the assault was made while defendant's employee was acting within the scope of his authority, in the absence of allegation that the employee was expressly or impliedly authorized by the defendant to commit the assault, is a mere conclusion.

Appeal from Circuit Court, Codington County.

Action by Lars O. Waaler against the Great Northern Railway Company. From an order overruling a demurrer to the complaint, defendant appeals. Reversed.

R. A. Wilkinson and Winsor & McNaughton, for appellant.
George W. Case, for respondent.

CORSON, P. J. This is an appeal from an order overruling the demurrer interposed by the defendant to plaintiff's complaint. The action was instituted to recover damages for an alleged assault and battery committed by one of the defendant's employees upon the person of the plaintiff. The

*See foot-note appended to *Letts v. Hoboken R. W. & S. C. Co.* (N. J.), 11 R. R. R. 139, 34 Am. & Eng. R. Cas., N. S., 139.

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plaintiff, in his complaint, alleges, in substance, that the defendant is a railroad corporation; that on the 26th day of January, 1903, and for a long time prior thereto, one Berit Pramhus was the owner and in possession of certain real estate described in the complaint; that upon the said 26th day of January the said defendant, under instructions of one of its general superintendents, ordered and commanded its section crew, of which Henry Doust was foreman and Edward Faust was one of the laborers, together with other men, to enter upon the premises above described, belonging to the said Berit Pramhus, adjacent to the defendant company's right of way, and at a distance of not less than 50 feet from the outside of the said right of way, for the purpose of building and constructing a snow fence, which said entry was made upon the said premises without the consent of the said Berit Pramhus, and against her protest; that the said Henry Doust was the foreman in charge of the said section crew, and with the authority of the said defendant company, who performed the act complained of, and his crew of men, including the said Edward Faust, were attempting to build and construct the snow fence upon the land aforesaid; and said Berit Pramhus instructed the said plaintiff to go to the said Henry Doust, as foreman of said section crew, and to advise him not to place said snow fence upon said land, and to remonstrate with, and to forbid them so to do; that the plaintiff, complying with such request, and in obedience to the commands of said Berit Pramhus, for whom he was then employed, went to the said Henry Doust, foreman of the said section crew, and to said crew, and remonstrated with them, and forbade them to erect and construct a snow fence upon said land, and demanded of them that they remove the same therefrom, whereupon, at the instance and request of the said Henry Doust, the section foreman as aforesaid, acting in behalf and for the benefit of the said defendant company, commanded the said Edward Faust to "go after" the said plaintiff, and thereupon the said Edward Faust did willfully and wantonly, and with force and arms, and without any just provocation therefor, beat and strike this plaintiff with his clenched fist, thereby knocking him down, and did then and there kick this plaintiff roughly and viciously with both of his feet in the side, whereby and on account of said willful and malicious striking and kicking by the said Edward Faust of this plaintiff, and while the said Edward Faust was acting for and in behalf of the said defendant company, he did cause the face of the said Lars O. Waaler to become sore, swollen, and bleeding, and did fracture and break one or more of the ribs of the said Lars O. Waaler, thereby causing him great bodily harm, suffering, and injury, rendering him unable to perform manual labor; all to his damage in the sum of \$1,500. The demurrer to the complaint was interposed upon the ground that the complaint does not state

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facts sufficient to constitute a cause of action. The question for determination by this court is, can the railroad company be held liable, upon the facts as stated, for the act of Edward Faust in assaulting and beating the plaintiff?

It will be observed that the defendant, through its general agent, directed its section foreman or boss to construct a snow fence on the land of Berit Pramhus without the line of the railroad property, and that the section foreman took with him certain of his crew, among whom was Edward Faust, to perform the work as directed to be done; that while constructing the said fence the plaintiff, under the instruction of Berit Pramhus, the owner of the land, forbade them to erect the same, and requested them to remove the part completed therefrom; that thereupon the foreman directed said Faust to "go after" the said plaintiff, and thereupon the said Faust did "willfully, wantonly, and with force and arms, and without just provocation therefor, beat and strike the plaintiff," and continued his assault upon him by striking and kicking him, resulting in serious injuries to the plaintiff. It is contended by the appellant that in making this assault upon the plaintiff, neither Faust, who made the actual assault, nor the foreman, who instructed him to make it, were acting in the line of their duty as employees of the company, and that the assault so made was the willful and malicious act of the foreman and of said Faust, for which the defendant company is not liable. It is insisted by the respondent in support of the court's ruling upon the demurrer that the acts of the foreman and Faust were done by them in furtherance of their employment, and was within the rule laid down by the courts holding the principal liable for the acts of its employees. The rule applicable to this class of cases is thus stated by the Supreme Court of Connecticut in *Stone v. Hills*, 45 Conn. 47, 29 Am. Rep. 635: "For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions, the servant alone is responsible." Of these conditions of liability the one under which the present case comes, if it comes under any of them, is the one for acts done "in the execution of the master's business within the scope of his employment." While the rule itself is simple, there is great difficulty in its application, for the reason that in many cases it is not easy to determine when the employee is acting in the execution of the master's business and within the scope of his employment. It is clear from the allegations in the complaint that the defendant owed no duty, by contract or otherwise, to protect the plaintiff from the willful

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assault of its employees, and it does not appear from these allegations that the foreman or employees were expressly or impliedly authorized to commit the assault complained of upon the plaintiff. The plaintiff was not interfering with the act of the foreman and employees in erecting the fence they were ordered to erect, nor did he threaten to interfere with them. He simply performed the duty imposed upon him by the owner of the property to remonstrate with them against erecting the fence, and request them not to proceed further. The act of the foreman in directing the employee and the act of the employee in assaulting the plaintiff were clearly without the scope of their authority. The facts, as disclosed by the complaint, bring the case within the principles of the case of *Holler v. Ross* (decided in 1902) 68 N. J. Law, 324, 53 Atl. 472, 59 L. R. A. 943, 96 Am. St. Rep. 546, in which the Court of Errors and Appeals of New Jersey held that "the servant of the master cannot bind the master to respond in damages to the plaintiff unless it be shown that the act which the servant did, which caused the injury, was an act which was expressly or by necessary implication within the line of his duty under his employment"; and that learned court held that the trial court erred in refusing to direct a verdict for the defendant. The facts in that case are quite analogous to those in the case at bar. The defendant was the owner of personal property situated upon a wharf, and the servant who made the assault complained of was employed by the defendant to guard the property and prevent its being stolen. Early in the evening three men appeared upon the wharf, among whom was the plaintiff, and upon demand of the servant refused to throw up their hands, and, starting to run away, the plaintiff was shot and seriously wounded by the servant; but it did not appear that the plaintiff or those with him attempted in any manner to interfere with the goods of the defendant, and the court, after a very full discussion of the question and consideration of the authorities, concludes its opinion as follows: "When the plaintiff rested its case the defendant moved to 'nonsuit because there is no testimony in this case which would, if true, operate to bind the defendant.' A careful examination of the plaintiff's proof makes it clear that such was the fact. The shooting by the servant of the defendant was not, under the proof made by the plaintiff, shown to have been done while the servant was acting within the lines of his duty or employment, and nonsuit should have been granted. Its refusal was error, and for this cause judgment should be reversed." We shall not attempt to review the numerous cases bearing upon this question, and shall only cite a few in support of the view we take of the case. *Henry v. Pittsburgh Ry. Co.*, 139 Pa. 289, 21 Atl. 157; *Vanderbilt v. Richmond Turnpike Co.*, 92 N. Y. 479, 51 Am. Dec. 315; *Sagers v. Nuckolls* (Colo. App.) 32 Pac. 187; *Dolan v. Hubinger*

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(Iowa) 80 N. W. 514; *Holler v. Ross* (N. J. Err. & App.) 53 Atl. 472, 59 L. R. A. 943, 96 Am. St. Rep. 546; *Ry. Co. v. Divinney* (Kan.) 69 Pac. 352; *Isaacs v. Third Ave. Ry. Co.*, 47 N. Y. 122, 7 Am. Rep. 418. The learned counsel for the plaintiff has cited a large number of authorities, but they are mostly railroad cases, in which parties have been assaulted or injured by conductors, trainmen, or station agents, and where the defendant was held to owe a duty to passengers to protect them from assaults and ill treatment while transporting them on their trains. It is true it is alleged in the complaint in the case at bar that the assault of the employee was made while acting within the scope of his authority, but this is the statement of a conclusion of law, and not of a fact. From the facts stated it is the duty of the court to determine whether or not the employee was in fact acting at the time of making the assault within the line of his duty as such employee in this case, as the facts are fully set out in the complaint, and, for the purpose of the decision upon the demurrer, must be taken to be true.

Our conclusion is that the circuit court erred in overruling the demurrer, and the order of that court is reversed.

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(Supreme Court of Alabama, May 17, 1904.)

[37 So. Rep. 395.]

Assignment of Error.

An assignment that the court erred in overruling demurrers to five different counts of the complaint cannot be sustained unless all are bad. Federal Automatic Coupler Act—Interstate Commerce—Application of Statute.*

Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p.

*As to when cars are used in carrying on interstate commerce, within the meaning of statutes, see *Winkler v. Philadelphia & R. Ry. Co.* (Del.), 6 R. R. R. 361, 29 Am. & Eng. R. Cas., N. S., 361 (if a car being moved has come from a point out of the state it has been moving interstate commerce, within the meaning of the federal automatic coupler act; and though a car was not used in interstate commerce, the case was within the act if the removal of such car was a necessary step in moving an interstate car); *Voelker v. Chicago, M. & St. P. Ry. Co.* (Iowa), 4 R. R. R. 509, 27 Am. & Eng. R. Cas., N. S., 509 (federal automatic coupler act applicable to car designed for interstate commerce though at the time it is being hauled empty); *Johnson v. Southern Pac. Co.* (C. C. A.), 5 R. R. R. 11, 28 Am. & Eng. R. Cas., N. S., 11 (cars loaded with articles shipped to other states and started, whether in yards, or outside tracks, or in trains, are being used to move interstate traffic); *United States ex rel. Kellogg v. Lehigh Val. R. Co.* (N. Y.), 3 R. R. R. 682, 26 Am. & Eng. R. Cas., N. S., 682 (fact that grain was received at initial point from carrier by which it was transported from point in another state, and was there stored for further shipment did not constitute it an interstate one, where it was taken under through bill of lading; and shipment between same points in state not an interstate one merely because line of road between terminal points passes through other states. See also, note, 21 Am. & Eng. R. Cas., N. S., 148; *Louisville & N. R. Co. v. Vancleave* (Ky.), 21 Am. & Eng. R. Cas., N. S., 477.

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3174], requiring railroads to equip their cars used in interstate commerce with automatic couplers, and making railroads liable for a personal injury action by a failure to comply with the statute, applies not only in cases where the cars are, at the very moment of the injury, being actually used in moving interstate traffic, but to cases where the injury occurs in the making up of the train for the purpose of moving interstate traffic.

Contributory Negligence—Pleading.

In an action for personal injuries, a plea that the negligence of plaintiff's intestate proximately caused the injuries is insufficient.

Same—Coupling Cars—More Dangerous Method.

Where a brakeman is required to go between cars in making a coupling, which can be made with greater safety by going between the cars on one side than by going in on the other side, he is not chargeable with contributory negligence in going in on the more dangerous side, if he could not do the work as well by going in on the safer side.

Wrongful Death—Right of Action.

Under Code 1896, § 27, providing that a personal representative may maintain an action for wrongful death, a personal representative may maintain an action for the death of a servant, caused by negligence of the master.

Same—Violation of Automatic—Coupler Act—Liability.

Under this section a recovery may be had for the death of an employee of a railroad company, caused by failure of the company to comply with Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901 p. 3174], requiring railroad companies to maintain automatic couplers.

Same—Same—Assumption of Risk.

Under Act Cong. March 2, 1893, c. 196, § 8, 27 Stat. 532 [U. S. Comp. St. 1901, p. 3176], providing that any employee of a common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of the act shall not be deemed to have assumed the risk, etc., a plea of assumption of risk in an action against a carrier for injuries to an employee resulting from a failure to comply with the act is frivolous.

Same—Same—Pleading.

Under Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], requiring the use of automatic couplers, and making railroads absolutely liable for injuries resulting from failure to use such couplers, it is unnecessary for the complaint in an action for the death of a servant, caused by failure to comply with the act, to allege in what manner the failure to comply with the act caused the injury.

Harmless Error.

In an action against a railroad company for the death of a servant, any error in sustaining a demurrer to a plea alleging that certain conduct of deceased constituted contributory negligence was harmless where there was a general plea of contributory negligence, under which defendant could prove any phase of contributory negligence.

Appeal—Review.

A responsive answer to a question not objected to cannot be regarded on appeal as constituting error.

Contributory Negligence—Coupling Cars—Evidence—Acts of Others.

In an action against a railroad company for the death of a servant while making a coupling defendant contended that deceased was guilty of contributory negligence in going between the cars on the inside of a curve to make the coupling, because there was not room to stand on the inside without being crushed: *held*, that evidence that another person had made a coupling on the curve in question by going between the cars on the inside of the curve was properly admitted.

Harmless Error.

Error, if any, in admitting evidence under a certain count of the complaint, was rendered harmless to defendant by the giving of a

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general charge in defendant's favor upon this count at the conclusion of all the evidence.

Federal Automatic Coupler Act—Judicial Notice.

In an action against a railroad company for the death of a servant caused by defendant's failure to comply with Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], the court will take judicial notice of what the act provides, and its introduction in evidence is immaterial.

Same—Violation—Prima Facie Case.

In an action against a railroad company for the death of a brakeman alleged to have been caused by defendant's failure to equip its cars with automatic couplers, as required by Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], proof that plaintiff's intestate was engaged in coupling cars at the time he was killed, that the cars were not provided with automatic couplers, and that the intestate's death was caused by the old-fashioned couplers slipping by one another, made a prima facie case.

Death of Employee—Negligence—Prima Facie Case—Contributory Negligence—Motion to Exclude All Evidence.

Where, in an action for death of a servant from the negligence of the master, plaintiff's evidence makes out a prima facie case of negligence, a motion to exclude all the evidence cannot be granted on the ground that plaintiff's testimony establishes contributory negligence, the proper proceeding in such case being by instruction.

Pleading and Proof—Instruction.

In an action for death by wrongful act, an instruction that there are eight more counts in the complaint, each one being in the nature of a separate suit, and if plaintiff has proved any of his counts he is entitled to recover, unless defendant has established some of the defenses pleaded thereto, is proper.

Contributory Negligence—Burden of Proof.

In an action for death by wrongful act the burden of proving contributory negligence is on defendant.

Direction of Verdict.

In an action for death by wrongful act the general affirmative charge to find for defendant cannot be given where there is material conflict in the evidence as to the right of recovery.

Trial—Argument of Counsel.

In an action for death by wrongful act, plaintiff's counsel, in making his opening argument, stated to the jury that they should give a large verdict as punishment, because, if they gave a small verdict, defendant could appeal, and delay the case, and, if a large verdict was given, it would be afraid of an affirmance, and propose settlement: *held*, that the refusal of the court to stop counsel was not reversible error.

Appeal from Circuit Court, Mobile County; Wm. S. Anderson, Judge.

Action by Charles L. Bromberg, Jr., as administrator, against the Mobile, Jackson & Kansas City Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This suit was instituted by the appellee in the circuit court of Mobile county to recover damages for the alleged negligence of the defendant, causing the death of his intestate, Arthur Robbins, on the 19th day of December, 1900. Plaintiff's intestate was employed as a brakeman by the defendant, and on the morning of the accident undertook to couple two cars of the defendant—one a caboose, equipped with a

link and pin coupler, and the other a passenger coach, equipped with what is known as a "Miller hook" coupler. The cars did not couple automatically. The coupling was attempted to be made on a very sharp curve in one of the tracks of the defendant company in its yard at its terminus in the city of Mobile. Plaintiff's intestate went in between the ends of the two cars, and took a position on the inside of the curve, and called to another brakeman of defendant, who was standing some distance from the train on the inside of the curve, to give the signal to the engineer to back the train up in order that he might make the coupling. When the train moved down to the car to which the coupling was to be made, deceased was caught between the corners of the two cars, on the inside of the curve, and after the cars were separated by the concussion walked from between them, and laid down on an embankment near the track, where he died immediately.

The substance of the averments of the first seven counts of the complaint as amended is sufficiently shown in the opinion. The eighth count of the complaint was in words and figures as follows: "(8) The plaintiff, Clara Miller, as the administratrix of the estate of Arthur Robbins, deceased, under appointment of the probate court of Mobile county, Alabama, sues the defendant, the above-named Mobile, Jackson & Kansas City Railroad Company, a corporation, and claims of it the sum of fifty thousand dollars as damages, for that heretofore, to wit, prior to and at the time of the matters and things herein complained of, the said defendant was in the possession and control of and was operating a railroad engaged in interstate commerce, and running its trains on its line of railroad from a point in Mobile county, Alabama, in or near the city of Mobile, Alabama, to Merrill, a place in the state of Mississippi, and engaged in carrying passengers and freight between various points in the state of Alabama and various points in the state of Mississippi; and the plaintiff avers that on the 19th day of December, 1900, the defendant was required by law, and it was the duty of said defendant, to have equipped its cars used in moving interstate traffic on its line with couplers which would couple automatically by impact; and the plaintiff avers that the defendant neglected to perform its said duty, and by reason of such negligence mashed to death the plaintiff's intestate, Arthur Robbins, who was then and there in the employ of the defendant while engaged in the performance of his duty in making a coupling in Mobile county, Alabama, on the said 19th day of December, 1900; to the great damage of the plaintiff, wherefore she sues." The eighth count of the complaint was demurred to upon the following grounds: (1) Said count fails to allege that plaintiff's intestate was mashed or jammed by the cars of defendant which were not equipped with automatic

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couplers as required by law. (2) Said count fails to allege any fact showing the relation between the failure of the defendant to equip its cars with automatic couplers as required by law and the death of plaintiff's intestate. (3) Said count fails to allege any fact showing that the character of employment in which plaintiff's intestate was engaged with defendant was such as to impose upon defendant the duty to plaintiff's intestate to equip its cars with automatic couplers. (4) Said count fails to allege any fact showing that the coupling alleged to have been attempted by plaintiff's intestate was the coupling of cars required by law to be equipped with automatic couplers. This demurrer was overruled.

The defendant pleaded the general issue and several special pleas, setting out its defense that the deceased assumed the risk or danger incident to his making the coupling, and therefore that he was killed by negligence which proximately contributed to his injury. Among the special pleas of the defendant interposed by the first six counts of the complaint was the following: "(3) Defendant further says that in the track of its said railroad at the point where plaintiff's intestate undertook to couple said coach and said caboose together there was a sharp curve, and that plaintiff's intestate negligently took a position between said coach and said caboose on the inside of said curve, where the cars would come together in the event the drawbars of said cars slipped by each other; and defendant alleges that plaintiff's intestate could with safety have taken a position between said cars on the outside of said curve, where, in the event said drawbars slipped by each other, there would have been ample room between the ends of said cars on the outside of said curve for plaintiff's intestate to have stood without danger. Defendant alleges that the danger due to standing between said cars on the inside of said curve was obvious; and defendant alleges that the said negligence of plaintiff's intestate proximately contributed to his alleged injuries." To this third plea the plaintiff demurred upon the following grounds: (1) Said plea raises no issue or issues which are not raised by the defendant's first and second plea, in this: said plea attempts to set up contributory negligence of plaintiff's intestate, and which defense of contributory negligence is fully raised by the second plea or pleas, and the defendant can under said plea avail itself of every legal defense of contributory negligence available to the defendant in this cause. (2) Because said plea does not allege that to go in between the cars on the outside of said curve was a proper way to go about making said coupling. (3) Because said plea fails to show that going between the ends of the cars on the inside of the curve was not a proper way of making said coupling. This demurrer was sustained. The other pleadings and rulings thereon are sufficiently stated in the opinion.

The bill of exceptions contains the following recitals in

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reference to a part of the argument made by plaintiff's attorney before the jury: "Plaintiff's counsel, in making the opening argument to the jury, among other things said: 'Gentlemen of the jury, you should give a large verdict in this case as punishment, because, if you give a small verdict, defendant could appeal, and delay the case, but, if a large verdict was given, it would be afraid of an affirmance, and would come forward with a proposition of settlement.' Defendant moved the court to stop counsel and exclude such argument. The court refused the motion, and defendant then and there excepted." Under the opinion on the present appeal it is not necessary to set out at length the many charges to the jury requested by the plaintiff and the defendant. There was verdict and judgment in favor of the plaintiff, assessing his damages at \$4,500. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

McIntosh & Rich, for appellant.

Gregory L. & H. T. Smith and Charles L. Bromberg, Jr., for appellee.

DOWDELL, J. This is a suit by Charles L. Bromberg, Jr., administrator, etc., against the appellant railroad company to recover damages for the negligent killing of Arthur Robbins on the 19th day of December, 1900. The deceased was a brakeman, and as such was at the time of his injury in the employment of the defendant company, and was killed while in the act of coupling two cars together in the discharge of his duties as brakeman. It is alleged in the complaint that the said Arthur Robbins was killed by being crushed between a caboose and a passenger coach, "which were being made up in a train of the defendant for interstate commerce," and while attempting to couple the two cars together. The alleged negligence of the defendant consisted in a failure on the part of the defendant company to comply with the provisions and requirements of the act of Congress known as the "Safety Appliance Act," approved March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]. The complaint was several times amended, and as finally amended contained eight counts. The first assignment of error relates to the ruling of the court on demurrers to the complaint. This assignment is as follows: "The court below erred in overruling the demurrers of the defendant to the amended complaint filed by the plaintiff on June 1, 1901, and also in overruling the additional demurrers to amended complaint filed June 4th, 1901." The demurrers that are referred to in this assignment are directed to the first, second, third, fifth, and sixth counts of the amended complaint. The orders overruled all of the demurrers. The assignment of error is a joint assignment of all these rulings, and unless there was error in overruling the demurrer to each and every count, the assign-

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ment is bad, and unavailing. The first three grounds of the demurrer raise the question of the necessity of alleging in the complaint in a suit under the federal statute that at the moment of the injury the cars are actually moving freight or passengers in the transportation of interstate commerce. The fourth ground is the alleged inconsistency in the several counts, in that it is averred in each that the caboose was not in use in moving interstate commerce, while in another part of the count it is averred that the coach and caboose were component parts of a train being made up for the purpose of moving interstate commerce. It is sufficient to say of this last ground of demurrer that it is without foundation in fact. There is no such allegation in any of the counts as that the caboose was not used in moving interstate commerce. As to the question raised by the first three grounds, it is to be observed that each count of the complaint alleges that the cars were at the time of the injury being made up into a train for the purpose of moving interstate traffic, and that one or the other of the cars, or both, were used by the defendant for that purpose. The federal statute above referred to requires railroads to equip their cars used in interstate commerce with automatic couplers, and for any injury to a person occurring by reason of their failure to do so they are unquestionably liable. The second section of the act of Congress provides as follows: "It shall be unlawful for any such common carrier to haul, or to permit to be hauled, or used on its line any car used in moving interstate traffic not equipped with couplers, coupling automatically, by impact, and which can be coupled without the necessity of a man going in between the ends of the cars." It would be a narrow and limited construction of this statute to say that it was only applicable in cases where the cars at the very moment of the injury are being actually used in moving interstate traffic, and not to cars where the injury occurs in the making up of a train of cars for the purpose of moving interstate traffic. The language employed in the statute, as well as the beneficent purpose for which it was enacted—the preservation of human life—forbids an interpretation so narrow. In *Voelker v. Chicago, M. & P. Ry. Co. (C. C.)* 116 Fed. 873, where the same question was under consideration, it was said: "This statute requiring railroad companies to equip their cars with automatic couplers was not enacted to protect the freight transported therein, but for the protection of the life and limb of the employees who were expected to handle these cars. The beneficent purpose of this statute is defeated if the employees are required to handle cars not equipped as required by the statute, without regard to the question whether the cars are loaded or not. * * * When companies like the defendant in this case are engaged in interstate traffic, it is their duty under the act of Congress, not to use, in connection with such traffic, cars

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that are not equipped as required by that act. This duty of proper equipment is obligatory upon the company before it uses the car in connection with interstate traffic, and it is not a duty which only arises when the car happens to be loaded with interstate traffic. * * * Whenever cars are designated for interstate traffic, the company owning or using them is bound to equip them as required by the act of Congress; and when it is shown, as it was in this case, that a railway company is using the car for transportation purposes between two states, sufficient is shown to justify the court in ruling that the act of Congress is applicable to the situation." The construction here given the act of Congress seems reasonable, and is in harmony with the evident purpose of the statute. The action of the court below in overruling this demurrer to the amended complaint was free from error, and, the assignment of error being general, covering the rulings on the demurrers as a whole, and not based on the rulings severably, must fail. See *Western Railway of Ala. v. Arnett*, 137 Ala. 414, 34 South. 997. For like reason the assignment of error numbered 6 must fail. This assignment is as follows: "(6) The court below erred in sustaining the demurrer of plaintiff to pleas 2b, 3b, 4b, 5b, 6b, and 7b to the seventh and eighth counts of the complaint." This is a joint assignment of several rulings, and can avail nothing unless each plea therein mentioned was a good plea to each count of the complaint. The one designated "2b" was as follows: "The defendant says that the negligence of the plaintiff's intestate proximately contributed to said injuries, as alleged in said counts." The insufficiency of this plea, when tested on demurrer, is plain and palpable under our decisions. *L. & N. R. R. Co. v. Markee*, 103 Ala. 164, 15 South. 511, 49 Am. St. Rep. 21; *Tenn. C. & R. R. Co. v. Herndon*, 100 Ala. 451, 14 South. 287. There was no error in the ruling on the demurrer to this plea, and the assignment of error under consideration embraced this ruling. The eighth assignment of error, like the first and sixth, is a joint assignment of several rulings. It assigns as error the overruling of the defendant's demurrer to the fourth, fifth, and seventh replications to the defendant's pleas. The averments in the fourth replication were, in substance, that, notwithstanding the matters and things alleged in said plea, the plaintiff's intestate, the said Arthur Robbins, could not have performed his duty as brakeman in making said coupling in the manner indicated in said plea as well and effectively as he could have performed it by going in between the cars on the inside of said curve as he attempted to do. It is not denied in the defendant's plea but that it was the duty of said Arthur Robbins to make the coupling, but the pleas to which said replication was filed set up as a defense to the action that there were other and different ways, attended with less danger, in which the coupling might have been made, without going in between the

cars, as the said Robbins attempted to do; and that he was guilty of negligence which contributed to his injury in going in between the cars to make the coupling, instead of adopting one or the other of the modes suggested in the pleas; the theory being that, where there are two ways open for the performance of an act or duty, the safer of the two ways—the one attended with the least danger—should be adopted. This principle is thus stated in the case of *Highland Avenue & Felt R. R. Co. v. Walters*, 91 Ala. 443, 8 South. 360: "A corollary from the rule that an employee is bound to use ordinary care to avoid injury is that, when there are two ways of discharging the duties incident to his employment apparent to the employee—one dangerous and the other safe, or less dangerous—he must select the safe or less dangerous way. But this rule rests on the hypothesis that he can perform his duties as well and efficiently in one way as the other." The replication to the plea in the case before us rests upon the proposition contained in the last clause of the above quotation, and the facts averred as responsive matter to the plea bring the replication clearly within the principle there stated. There was no error in overruling the demurrer to this replication.

The overruling of the defendant's demurrer to the complaint, and each count thereof, as shown on page 36 of the record constitutes the second assignment of error. This demurrer, which was overruled by the court, was addressed to the complaint as a whole, and to each count of the complaint, and contained three grounds: "First, because said complaint, and each count thereof, shows that plaintiff's action is instituted under a statute of Alabama without alleging any act of negligence on the part of defendant recognized by the laws of the state of Alabama; second, because the act of Congress upon which plaintiff relies to fix negligence upon the defendant has no application to cases in which death ensues as a result of the negligence alleged in said complaint and each count thereof; third, said complaint and each count thereof shows that plaintiff's intestate was in the employ of the defendant at the time of the alleged injury, and alleges no facts showing liability of defendant therefor." This demurrer presents for consideration two questions: First, whether a recovery can be had under section 27 of the Code of 1896 for an act which is wrongful by reason of a failure to comply with the federal statute; second, whether a recovery can be had against a master for the death of an employee under said section, resulting by reason of the failure of the master to comply with the requirements of the federal statute. We will consider these two propositions in the inverse order of their statement above. Section 27 of the Code reads as follows: "A personal representative may maintain an action and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any

person or persons, or corporation, his or their servants or agents, whereby the death of his testator was caused, if the testator or intestate could have maintained an action for such wrongful act, omission or negligence, if it had not caused death," etc. The language of the statute is plain, and, we think, sufficiently broad to embrace within its provisions any person who comes to his death by the wrongful act, omission, or negligence of another person or corporation, irrespective of class, or of the relation existing between the deceased person and the one guilty of the wrongful act, omission, or negligence causing the death. In the case of *S. & N. R. Co. v. Sullivan*, 59 Ala. 279, in speaking of the act of February 5, 1872 (Pamph. Acts, p. 83, which act is substantially embraced in section 27 of the Code of 1896), it was said: "This statute contains no qualifying clause limiting its remedial provisions to any class or classes of persons, or excluding any class from its wholesome terms. It employs the word 'person' in its broadest sense, and it would seem that every living being falling within that designation, may take shelter under its protecting wing." In *Dantzler v. De Bardeleben Coal & Iron Co.*, 101 Ala. 309, 14 South. 10, 22 L. R. A. 361—a suit by the administrator against the master for the death of an employee—the first count in the complaint was predicated on this statute, and the remaining counts on the statute commonly known as the "Employer's Liability Act" (section 1749 of the Code of 1896) and the right of action by the administrator against the master for the death of the employee caused by the wrongful act, omission, or negligence of the master was not questioned. As suggested by counsel for appellee, it may be there are defenses to an action for the death of a servant which could not avail in a suit for injury to a stranger, such as assumption of risk, or that the injury was caused by the negligent act of a fellow servant, but this is no argument against the right of action under this statute for the death of the servant or employee, as these distinctions go only to the question of whether or not there has been a violation of duty to the deceased person, and therefore as to whether the deceased person himself would have had the right to recover had he lived. They furnish no distinctions as to the character of the parties whose rights will be enforced under this statute when the case is such that the deceased would have recovered had death not ensued. It is insisted in argument by counsel for appellant that under the federal statute in question no cause of action exists where death results, but only in cases of "injury" to the person; and this upon the theory that the statute should be construed as limiting the right of action to the person injured. The purpose of the statute was as much for the preservation of life as limb. It imposed a duty, and the violation of that duty, where injury to person results, is counted for negligence in an action for damages, as much so

as the violation by the common carrier of any duty in the management and running of its locomotive and cars imposed by municipal or state laws. The right of action in the appellee is given by the state statute (section 27 of the Code of 1896). The ground upon which a right to damages is based is the negligent killing of plaintiff's intestate, which negligence consisted in the failure of the defendant company to comply with the requirements of the federal statute. Our statute gives the right of action to the personal representative for the wrongful act, omission, or negligence of any person or corporation causing the death of the intestate. The federal statute imposes a duty on the corporation, and a violation of that duty from which death results is an "omission" or "negligence" within the meaning of our statute. A similar, if not the precise, question was considered in the case of *Gray's Ex'r v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729, in a suit for the recovery of damages for the loss of cotton by reason of the failure of the trading company to cover it while in transportation, in accordance with the act of Congress requiring the use of tarpaulins, etc. In that case it was ruled that a failure to comply with the requirements of the federal statute was an act of negligence, and for which the defendant was liable in damages for the injury resulting from it. See, also, the following cases: *Carrie Loughin v. McCaulley*, 186 Pa. 517, 40 Atl. 1020, 48 L. R. A. 33, 65 Am. St. Rep. 872; *Carroll v. Staten Island R. R.*, 58 N. Y. 128, 17 Am. Rep. 221. This, we think, sufficiently disposes of both questions raised by the demurrer, and in favor of the ruling of the lower court.

The act of Congress in question, being a regulation of interstate commerce, and over which Congress has exclusive jurisdiction, its provisions are binding upon the courts of all the states. So. *R. R. Co. v. Harrison*, 119 Ala. 539, 24 South. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936; *Boyd v. Nebraska, etc.*, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103. Section 8 of the act of congress is as follows: "That any employee of any such common carrier who may be injured by any locomotive, car or train in use, contrary to the provision of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge." [U. S. Comp. St. 1901, p. 3176.] The language employed in this section plainly precludes the defense of assumed risk, and pleas setting up this defense in an action under this statute may well be stricken on motion as being frivolous. There was no error in striking the pleas setting up this defense, as complained of under the third and fifth assignments of error.

What we have already said with reference to the ruling of the court on the demurrer to this complaint under the second assignment of error applies to the questions raised under the

fourth assignment, which relates to the overruling of the demurrer to the eighth count of the complaint, unless it is that this demurrer raises the question of the insufficiency of the count in alleging the *quo modo* by which the failure of the defendant to equip its cars as required by the act of Congress resulted in the death of plaintiff's intestate. The duty, however, was shown, and it was unnecessary to allege the *quo modo* by which the negligence caused the injury. *Armstrong v. Montgomery St. Railway Co.*, 123 Ala. 244, 26 South. 349; *Ga. Pac. R. R. Co. v. Davis*, 92 Ala. 307, 9 South. 252, 25 Am. St. Rep. 47; *L. & N. R. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *Highland Avenue & Belt R. R. v. Miller*, 120 Ala. 535, 24 South. 955.

The seventh assignment of error challenges the ruling of the court in sustaining demurrers to the third plea to the first six counts of the complaint. We need not stop to discuss this assignment, for, if there was error, it was error without injury, since there was a general plea in of contributory negligence to the first six counts, as shown by the record, under which opportunity was had of proving any phase of contributory negligence which could have been presented under a special plea. *Ala. Gt. So. R. R. v. Davis*, 119 Ala. 582, 24 South. 862. For the same reason there was no reversible error in sustaining the demurrer to the third plea as amended, filed to the first six counts of the complaint.

On the trial exceptions were reserved to certain rulings of the court in the admission of evidence. The first of these exceptions was to the refusal of the court to exclude a statement by the witness Herron that "a negro made the coupling between the train and the caboose ahead of the coach from the inside of the curve." This statement was responsive to a question to which no objection was made, and that is sufficient to uphold the ruling of the court. But the evidence was, under the issues, competent. The contention of the defendant was that there was not space enough on the inside of the curve between the cars, when the cars came together, to do the coupling, without the person attempting to do so being crushed to death, and the testimony of some of defendant's witnesses tended to support this contention. The fact that the negro did make the coupling from the inside of the curve without being crushed was pertinent, and directly contradictory of the tendency of defendant's evidence on this point.

The next exception reserved was to the action of the court in overruling defendant's objection to the question asked the witness Heron, "Was the curve uniform or not?" The bill of exceptions shows that after the objection was interposed and ruled on the question was not answered, and counsel then asked, "Was it [the curve] uniform or not, so far as could be judged by the eye?" To the question in the last form, and to which answer was made, no objection was made.

A number of the exceptions taken were on objection to evidence offered on the issues as they existed at the time, made up under the seventh count of the complaint. These rulings need not be considered, since, upon the conclusion of all the evidence in the case, at the request of the defendant the court gave the general charge in its favor on this count. So, if there was any error in any of the court's ruling on the introduction of evidence under the seventh count, it was error without injury. This evidence related to the kind and condition of the couplers used on the cars which the deceased attempted to couple together when he received his injury. The couplers were not the automatic couplers, but were the Miller and link and pin couplers, which required the person making the coupling to do so by hand. We are unable to see wherein this evidence could prejudice the defendant after the seventh count, under which it was offered, was charged out. The other counts counted on the failure of the defendant to have automatic couplers is required by the act of Congress, and that the defendant did not have the automatic couplers on the cars which the deceased attempted to couple was a conceded fact.

The defendant objected to the introduction in evidence by the plaintiff of the act of Congress requiring railroads engaged in interstate commerce to equip their cars with automatic couplers. The courts take judicial knowledge of what this act embraces, and therefore it was immaterial whether it was introduced in evidence or not. 17 A. & E. Ency. Law (2d Ed.) p. 928.

The defendant moved to exclude all the evidence offered on behalf of the plaintiff on the grounds (1) that no prima facie case had been made out by the evidence; (2) because the evidence showed without conflict a case of contributory negligence. This motion was overruled, to which ruling the defendant excepted, and now assigns the same as error. There was evidence tending to support each count of the complaint, leaving out of consideration the 7a count. The first six counts were substantially the same in their averments, and, in legal effect, there was no difference, and the eighth count differed only in that it did not undertake fully to describe the manner in which the injury occurred, as was done in the first six counts, the gravamen of each count being the violation of the federal statute requiring railroads engaged in interstate commerce to equip their locomotives and cars with automatic couplers, and the failure of the defendant company to comply with its provisions. That the cars which were being coupled by the plaintiff's intestate at the time he was killed were used in interstate commerce, and were not provided with automatic couplers, and that intestate's death was occasioned by reason of the old-fashioned couplers which were being used slipping by one another at

the time the cars were brought together for the purpose of being coupled, was without dispute, and was proven by the testimony of the witness Herron. So, clearly, the first ground of the motion to exclude was wholly without merit. The second ground is upon the theory, as urged in argument by counsel for appellant, that the testimony introduced by the plaintiff himself established the truth of the plea of contributory negligence. Conceding this to be true, then the proper course to pursue was, not by motion to exclude the evidence, but by appropriate instructions to the jury from the court, requested in writing by the defendant. Where the evidence of the plaintiff fails to make a *prima facie* case, the motion to exclude would be proper, and this upon the idea of its immateriality. But to have sustained the motion in the present case, where a *prima facie* case as alleged in the complaint was shown, upon the theory that the plaintiff's evidence also sustained the defendant's plea of contributory negligence, would have been to take from the jury the right to pass on the credibility of the testimony, which the plaintiff was entitled to have done. *Smith v. Kaufman*, 100 Ala. 410, 14 South. 111.

There were other objections to the introduction of evidence than those we have heretofore adverted to, and exceptions reserved to the rulings of the court, but it would unduly and unnecessarily extend this opinion to discuss them in detail. We have examined and considered these exceptions, and we do not find that any reversible error was committed.

The court gave several charges requested in writing by the plaintiff. The appellant assigns as error the giving of these several charges jointly in one assignment. Of course, each and every one of these given charges must be bad to sustain the assignment; in other words, if any one of them was properly given, the assignment of error will avail nothing. The first of these given charges was as follows: "The court charges the jury that there are eight counts in the complaint, each one being in the nature of a separate suit; and if the plaintiff has proven any one of his counts he is entitled to recover, unless the defendant has established some of the defenses pleaded thereto." This charge correctly states the law, and the giving of it was free from error. The next given charge included in the assignment was as follows: "The court charges the jury that the burden of proving contributory negligence rests upon the defendant." No fault is to be found in this charge, and the giving of it was likewise free from error. It follows, therefore, that the assignment, being bad as to these charges, must fail altogether. The assignment of error as to charges refused to the defendant was also joint, and, for the same reasons stated above, unless all of the charges included in the assignment should have been given, the assignment is unavailing. The first one of the refused charges was the general affirmative charge to

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find for the defendant. This charge can never be given when there is a material conflict in the evidence, or when the evidence is such as to afford reasonable inference of the existence of any facts or fact unfavorable to a right of recovery by the party asking it. Without undertaking to rehearse the testimony in the case, it is sufficient to say that the evidence was not free from conflict, and unquestionably afforded reasonable inference to be drawn by the jury unfavorable to the right of the defendant to a verdict in its favor. There was no error in the refusal of the charge, and it follows that this assignment, being joint, like the other one, must fail.

Remarks of counsel for plaintiff made in argument before the jury, and to which objection was made and exceptions reserved to the court's ruling on the objection, while not to be commended, were not such as should work a reversal of the cause for the refusal of the trial court to arrest the same. The remarks objected to did not infringe the rule laid down by this court in the case of *Cross v. State*, 68 Ala. 476, 484, where it is said that: "The statement must be made as of fact. The fact stated must be unsupported by any evidence, must be pertinent to the issue, or its natural tendency must be to influence the finding of the jury, or the case is not brought within the influence of this rule."

We have not followed counsel in a consideration of some propositions discussed in briefs, for the reason that the state of the record and the disposition of a number of assignments of error by us rendered it unnecessary to a final conclusion of the case. We find no reversible error, and the judgment will be affirmed.

Affirmed.

CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, Piff.
in Err., v. LAURA LOUISE McDADE, Lucy W. McDade, and
Kinney McDade, Defts. in Err.

(Submitted October 14, 1903. Decided November 2, 1903.)

[24 Sup. Ct. Rep. 24.]

Killing of Brakeman—Cause of Death—Overhanging Waterspout.

The question whether a railroad brakeman was killed as a result of a collision with an overhanging waterspout on a water tank is for the jury, where there was evidence that when last seen he was signaling the engineer from his post on a car of more than average height and width, where he would be likely to be struck by the spout in passing, and that shortly thereafter he was missed from the train, his lantern found on the car, and his body discovered about 675 feet beyond the tank, with injuries which might have been produced by a collision with the obstruction.

Same—Negligence—Proximity of Waterspout.*

It is negligence as matter of law for a railroad company to maintain

*See foot-note appended to *Withee v. Somerset Traction Co. (Me.)*, 12 R. R. 46, 35 Am. & Eng. R. Cas., N. S., 46; foot-note appended to *Choctaw, etc., R. Co. v. McDade (U. S.)*, 12 R. R. 26, 35 Am. & Eng. R. Cas., N. S., 26.

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an iron spout so attached to a water tank as to be a constant menace to the lives and limbs of brakemen on its trains, where it might readily have been so constructed and hung as to be safe.

Defective Appliances—Assumption of Risk.†

An employee assumes the risk of injury from defective appliances furnished by his employer only when the defect is known to, or plainly observable by, the employee.

Assignments of Error.

Assignments of error as to the admission of testimony are not reviewable on writ of error from the Supreme Court of the United States when based upon exceptions general in their character.

Evidence—Changed Conditions.

The admission of testimony, in an action to recover damages for the death of a railroad brakeman, alleged to be the result of a collision with an overhanging waterspout, that such spout was so reconstructed after the accident as to be farther removed from passing trains, is not error, where the jury are told that such change had no other bearing upon the issues involved than to test the correctness of the measurements offered in evidence by the railroad company to show that the waterspout did not constitute danger to brakemen on passing trains.

In Error to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of Tennessee in favor of plaintiff in an action to recover for a death by wrongful act. Affirmed.

See same case below, 50 C. C. A. 591, 112 Fed. 888.

The facts are stated in the opinion.

Messrs. J. W. McLoud, Geo. B. Peters, E. E. Wright, and C. M. Bryan for plaintiff in error.

Messrs. G. T. Fitzhugh and J. H. Watson for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court:

This was an action to recover for the death, by wrongful act, of John I. McDade, an employee of the Choctaw, Oklahoma, & Gulf Railroad Company. The plaintiff recovered a judgment in the circuit court, which was affirmed in the court of appeals. 50 C. C. A. 591, 112 Fed. 888.

There was evidence tending to show that McDade, a brakeman in the employ of the company, was killed on the night of August 19, 1900, while engaged in the discharge of his duties as head brakeman on a car in one of the company's trains. McDade was at his post of duty, and, when last seen, was transmitting a signal from the conductor to the engineer to run past the station of Goodwin, Arkansas, which the train was then approaching. The train passed Goodwin at a rate of from 20 to 25 miles an hour. At Goodwin there was a

†As to contributory negligence and assumption of risk where railroad employees are injured by reason of the proximity of structures near track, see foot-note appended to *Coles v. Union Terminal Ry. Co.* (Iowa), 11 R. R. R. 392, 34 Am. & Eng. R. Cas., N. S., 392; *Hoffmeier v. Kansas City, Leavenworth R. Co.* (Kan.), 11 R. R. R. 207, 34 Am. & Eng. R. Cas., N. S., 207.

water tank, having attached thereto an iron spout, which, when not in use, hung at an angle from the side of the tank. Shortly after passing Goodwin, McDade was missed from the train, and, upon search being instituted, his lantern was found near the place on the car where he was at the time of giving the signal. His body was found at a distance of about six hundred and seventy-five feet beyond the Goodwin tank. There was also testimony tending to show, from the location of the waterspout and the injuries upon the head and person of McDade, that he was killed as a result of being struck by the overhanging spout. The car upon which McDade was engaged at the time of the injury was a furniture car, wider and higher than the average car, and of such size as to make it highly dangerous to be on top of it at the place it was necessary to be when giving signals, in view of the fact that the spout cleared the car by less than the height of a man above the car when in position to perform the duties required of him.

There was no eyewitness as to the exact manner of the injury to McDade, and it is urged that the court below should have taken the case from the jury because of the lack of testimony upon this point. It was left to the jury under proper instructions to find whether McDade came to his death in the manner stated in the declaration, and the court distinctly charged that, unless satisfied of this, there could be no verdict against the railroad company. While the evidence was circumstantial, it was ample, in our opinion, to warrant the submission of this question to the jury under the instructions given. Furniture cars like the one on which McDade was riding were received and transported over this road. There is testimony tending to show that a proper construction of the tank and appliances required the spout to hang vertically when not in use, and other testimony to the effect that, when hung in this manner, it would be difficult, if not impossible, for the fireman to pull down the spout in taking water, and that to hang it at an angle is, at least, a more convenient method of adjustment. Be this as it may, the testimony makes it clear that in the proper construction of this appliance there is no necessity of bringing it so near to the car as to endanger brakemen working thereon. Whether hung at an angle or not, it can be so constructed as to leave such space between it and the top of the car as to make it entirely safe for brakemen in passing. The testimony makes it equally clear that, when on the furniture car, McDade, sitting at his post, would be likely to be struck by the spout in passing. It is undoubtedly true that many duties required of employees in the transaction of the business to be carried on by a railroad company are necessarily attended with danger, and can only be prosecuted by means which are hazardous and dangerous to those who see fit to enter into such employment. Where no necessity exist, as in the present case, for the use of dan-

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gerous appliances, and where it is a matter requiring only due skill and care to make the appliances safe, there is no reason why an employee should be subjected to dangers wholly unnecessary to the proper operation of the business of the employer. *Kelleher v. Milwaukee & N. R. Co.*, 80 Wis. 584, 50 N. W. 942; *Georgia P. R. Co. v. Davis*, 92 Ala. 300, 9 So. 252; 1 *Shearm & Redf. Neg.* 5th Ed. § 201, and cases cited.

We agree with the circuit court of appeals in affirming the instructions upon this subject given by Judge Hammond to the jury, in which he said: "It is so simple a task, one so devoid of all exigencies of expense, necessity, or convenience, so free of any consideration of skill, except that of the foot rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakemen on the trains is a conviction of negligence."

It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use ordinary care to provide properly constructed roadbed, structures, and track to be used in the operation of the road. *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. Ed. 766, 16 Sup. Ct. Rep. 618. The spout might readily have been so constructed and hung as to be safe. As it was maintained, it was a constant menace to the lives and limbs of employees whose duties required them, by night and day, to pass the structure. It is a case where the dangerous structure is not justified by the necessity of the situation, and we agree with the judgments in the courts below that its maintenance under the circumstances was negligence upon the part of the railroad company. The court, having left to the jury to find the fact as to whether McDade was killed by the obstruction, did not err in giving instruction that the negligent manner in which the waterspout was maintained was, of itself, a conviction of negligence.

The court left to the jury the question of the assumption of risk upon the part of McDade, with instructions which did not permit of recovery if he either knew of the danger of collision with the waterspout, or, by the observance of ordinary care upon his part, ought to have known of it. The servant assumes the risk of dangers incident to the business of the master, but not of the latter's negligence. *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 25 L. Ed. 612; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. Ed. 605, 2 Sup. Ct. Rep. 932; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. Ed. 755, 6 Sup. Ct. Rep. 590; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. Ed. 958, 14 Sup. Ct. Rep. 978. The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he

does not assume the risk of the employer's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and, in such case, cannot recover. The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee. *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. Ed. 1188, 18 Sup. Ct. Rep. 777.

There was testimony tending to show that McDade had been over the part of the road where the Goodwin tank was situated only a few times, and that part of the trips were made in the night season, and also, that the furniture cars were of unusual height as compared with those generally used in the transaction of the business of the company. Neither the assumption of risk nor the contributory negligence of the plaintiff below was so plainly evidence as to require the jury to be instructed to find against the plaintiff, but, under the facts disclosed, these matters were properly left to the determination of the jury.

Numerous exceptions were taken to the refusal of the court to charge in certain respects, but, as the charge given was proper and pertinent to the facts and sufficiently comprehensive, it was not error to refuse such requests. The assignments of error as to the admission of testimony were nearly all based upon exceptions, general in their character, and, under the well-settled rule, not reviewable here. *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299; *Noonan v. Caledonia Min. Co.*, 121 U. S. 400, 30 L. Ed. 1063, 7 Sup. Ct. Rep. 911; *District of Columbia v. Woodbury*, 136 U. S. 462, 34 L. Ed. 476, 10 Sup. Ct. Rep. 990.

The one of most gravity is as to the admission of testimony to show that after the accident the waterspout at Goodwin was reconstructed so as to be placed at a point farther removed from passing trains. Evidence having been introduced by the railroad company to show by measurements that

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the waterspout did not constitute danger to brakemen on passing trains, the court permitted plaintiff below to show that changes had been made which might have an effect upon the subsequent measurements offered in evidence. The jury were told that nothing could be inferred against the defendant company by reason of the fact that, after the accident, such reconstruction of the spout was made, and that such change had no other bearing upon the issues of the case than to enable the jury to ascertain the value of the measurements offered in evidence.

We find no error in the judgment of the Circuit Court of Appeals, and it is affirmed.

CRANE *v.* CHICAGO, R. I. & P. R. CO.

(Supreme Court of Iowa, April 9, 1904.)

[99 N. W. Rep. 169.]

Duties of Master—Appliances—Hidden Dangers.*

It is the duty of an employer to furnish his employee with reasonably safe appliances, having in mind the character of his employment; and, where the use of any appliance involves special or hidden danger, of which the employee is ignorant, it is the duty of the employer to advise him respecting such danger.

Injury to Servant—Assumption of Risk—Defective Appliances.†

Where there is a defect in a proper appliance, or a danger in the use thereof, and the employee is advised of such defect or danger, and continues to make use of the appliance without complaint or protest, although he has time and opportunity to make the same, he assumes the risk of such defect or danger, and cannot recover in the event of accident.

Same—Negligence—Question for Jury.

Where a railroad permits the carriage in its engine cab of loose fuses in a box of such length as to permit of them sliding and ignition, and the fuses become ignited, filling the cab with fumes and causing injury to the engineer, the question of the railroad's negligence is one for the jury.

Same—Assumption of Risk.

Where an engineer knew when he took charge of the engine the precise condition of chemical fuses packed loosely in a box, and knew that the motion of the engine while running would cause the loose fuses to slide from one end of the boxes to the other, and nevertheless continued in his employment for months without complaint or protest, he assumed the risk of an ignition of the fuses which filled the cab with gases.

Same—Contributory Negligence.

As he failed to adopt any precautionary measures, such as packing the fuses with waste, so as to have prevented their motion, he was also guilty of contributory negligence.

*As to the master's duty to instruct and warn employees, see foot-note appended to *Gay's Adm'r v. Southern Ry. Co. (Va.)*, 8 R. R. 537, 31 Am. & Eng. R. Cas., N. S., 537.

†See foot-note appended to *Carson v. Southern Ry. Co. (S. Car.)*, 12 R. R. 337, 35 Am. & Eng. R. Cas., N. S., 337, where all the preceding authorities in this series are collected.

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Appeal from District Court, Polk County; S. F. Prouty, Judge.

Action to recover damages for a personal injury occasioned, as alleged, by the negligence of defendant. At the close of the evidence for plaintiff, there was a directed verdict in favor of defendant. Plaintiff appeals. Affirmed.

Ryan, Ryan & Ryan, for appellant.

Carroll Wright and J. I. Dille, for appellee.

BISHOP, J. For 20 years or more prior to the time of the accident of which he complains, plaintiff had been a locomotive engineer in the employ of the defendant company. For 10 years or more he had been required, in common with other enginemen in the employ of the company, to carry on his engine a quantity of fuses, to be used as necessity might require in giving emergency signals. A fuse is described as being a tube several inches in length, filled with chemical substances, and capable, when ignited, of giving off different colored lights. One end of the tube is prepared for the purpose of ignition, and ignition is accomplished by friction. Until desired for use, a cap protects the end thus prepared. No question is made but that the requirement of the company was a reasonable and proper one, and that it had been acquiesced in by plaintiff without complaint or protest is conceded. The fuses were such as were in customary use, were not defective in construction, and it is not pretended that, in themselves, or when properly handled, they were dangerous. Plaintiff says he was familiar with the use of fuses, and knew that friction only was required to produce ignition when once the cap was removed. He further says that, while he did not know that the caps would come off unaided, he did know that if a cap came off, and turned around and rubbed against the friction end of the fuse, ignition would follow. The engine in use by plaintiff had been operated by him for about four months prior to the accident. When he took charge of it, he made an examination as to its equipment, and this in response to a rule of the company, which required that all enginemen, "whose duty shall require them to give signals, must provide themselves with the proper appliances, and keep them in good order, and always ready for immediate use." It appears that engineers in the employ of the company carried the fuses on their engines at such place in the cab or on the tender, and in such receptacle, as they might select. On the engine taken charge of by plaintiff, he found the fuses in an open box fastened up in the cab back of the engineer's seat, and close to the roof—the long way of the box being crosswise of the cab. He observed that the fuses were laid in the box loose, without packing, and that they were about two inches shorter than the box. He counted them and returned them to the box, and, not having occasion to use any, he thereafter

paid no further attention to them. The accident occurred while the train was running between stations, and was caused by the ignition of the fuses in the box, whereby the cab became filled with gases and fumes arising from the burning chemicals. And it is the contention of plaintiff that he was unable to escape; that he was compelled to breathe such gases and fumes into his lungs in greater or less quantity, making him sick, so that he was unable to continue his employment, and permanently impairing his health. It is not certainly known what was the immediate cause of the accident. Plaintiff says that at the time it occurred his engine was running about 65 miles an hour; that there was a good deal of side motion to the swiftly running engine, the oscillation being sufficient at times to throw the engineer off his seat; that the fuses would have been agitated and moved by such motion. It is most probable that the swaying of the engine caused the loose fuses to slide from one end of the box to the other, that in the course thereof the protecting caps on one or more became loose and worked off, and that the subsequent sliding caused sufficient friction to produce ignition. This conclusion accords with the view taken by counsel for both parties. Accepting such to be the situation—and the whole case is comprehended therein—we are brought to inquire whether the facts appearing make out a case of actionable negligence, as charged, against the defendant company, and, as well, whether it is disclosed from such facts that plaintiff was himself free from negligence contributing to his accident and injury. Turning to the petition, the substance of the charge of negligence relied upon is that the fuses were left in the box loose and unprotected, and with no packing or other device to hold them securely in place, and, further, because the box was improperly constructed, being longer than the fuses, and thus admitting of friction by the sliding of the fuses therein. That it was the duty of the defendant company to furnish plaintiff with reasonably safe appliances and instrumentalities, having in mind the character of his employment, may be accepted as the general rule of law by which primarily the rights of the parties are to be tested. And where the use of any appliance or instrumentality involved special or hidden danger, of which the employee is ignorant, or is unfamiliar with, it is the duty of the master to advise him respecting such danger. Turning the subject around, if defect there be a proper appliance or instrumentality, or if there be danger in the handling or in the use thereof, and the employee is advised in advance of such defect or danger, and continues to carry or make use of the appliance or instrumentality without complaint or protest, although time and opportunity is afforded him so to do, then, generally speaking, he is said to have assumed the risk, and he cannot recover in the event an accident does occur. So, too, where an employee is called upon to deal with an

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appliance or instrumentality, and, being familiar with the use thereof, he fails to exercise due care, whereby an accident results, he may not recover damages occasioned by such accident, because involved therein is negligence on his own part. The foregoing are all familiar principles of law, and require no citation of supporting authority. It does not appear by whom the box in the cab was constructed and put in place, nor does it appear who originally placed the fuses in such box. Construing the situation most favorably to plaintiff, we are bound to assume that such was done by direction of the defendant company. That it was unsafe to carry loose fuses in a box, of such length as to permit of sliding and possible ignition, hardly admits of a question. Such being the facts, negligence on the part of the defendant company may very well have been predicated thereon, and manifestly the question was a proper one to go to the jury.

But conceding the negligence of defendant, a recovery is not authorized, as we have seen, if there was an assumption of the risk of accident by plaintiff, or if there was a failure on his part to exercise due care. And these, we think, appear from the record before us. First as to the assumption of the risk. Plaintiff knew when he took charge of the engine what were the precise conditions respecting the box and the fuses therein contained. He knew that the motion of the engine while running would cause the loose fuses in the box to slide from one end thereof to the other. He knew the character of the fuses, and what was the probable consequence of the sliding motion. Accordingly, he was made fully aware of the condition involving negligence on the part of defendant, and for months he continued in his employment without complaint or protest. "The principle is that, where the servant has as good an opportunity as the master to ascertain and avoid the danger for himself, he will have no recourse against the master in case he is injured thereby, and he accepts the employment upon this implied condition." Such is the general rule as applied to cases of the character of the one before us. *Buswell on Personal Injuries*, p. 456. See, also, *Koontz v. Railway*, 65 Iowa, 226, 21 N. W. 577, 54 Am. Rep. 5; *McKee v. Railway*, 83 Iowa, 616, 50 N. W. 209, 13 L. R. A. 817; *Trcka v. Railway*, 100 Iowa, 205, 69 N. W. 422; *Stockwell v. Railway*, 106 Iowa, 63, 75 N. W. 665.

Contributory negligence on the part of the plaintiff is apparent from the fact that, notwithstanding his knowledge of the negligent condition alleged, and that danger was to be apprehended therefrom, and notwithstanding it was made his duty, by a rule of the company, to keep the fuses "in good order and always ready for immediate use," he wholly failed and neglected for months to adopt any measure or take any steps to guard against accident or to protect himself from danger. He says his cab was supplied with waste, and that he could have easily packed the fuses therewith, and thus have

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prevented motion being communicated thereto. To have adopted such simple precaution would have made the accident impossible. Having knowledge of the conditions out of which the danger arose, and being charged with a duty, his failure to adopt any precautionary measure was negligence, such as to bar a recovery. It follows that an instructed verdict was warranted, and the judgment is affirmed.

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(Supreme Court of Illinois, June 23, 1904.)

[71 N. E. Rep. 850.]

Death of Fireman—Obstruction on Track—Duty to Warn Servant—Question for Jury.*

In an action against a railroad company for the death of a fireman, alleged to have been caused by negligence of defendant in failing to warn deceased that a car obstructed the track at a siding, and in failing to display a danger signal at that place, evidence *held* to require submission to the jury of the issue of defendant's negligence in those respects.

Non-assignable Duties—Duty to Warn Servant.

The duty of a master to warn a servant of danger cannot be delegated to a fellow servant, so as to absolve the master from liability for injury resulting from failure to communicate the warning.

Error to Appellate Court, Fourth District.

Action by Susan D. Rogers, as administratrix of Nathan L. Rogers, deceased, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment of the Appellate Court (109 Ill. App. 494), affirming a judgment for defendant, plaintiff brings error. Reversed.

Lands & Kolb, for plaintiff in error.

C. S. Conger, for defendant in error.

WILKIN, J. Plaintiff in error sued out this writ to reverse a judgment of the Appellate Court for the Fourth District, affirming a judgment against her for the costs of a suit by her against the defendant in error. She brought her action on the case in the circuit court of Wabash county against the defendant for wrongfully causing the death of her husband, Nathan L. Rogers. At the close of all the evidence the jury were peremptorily instructed to return a verdict for the defendant, which being done, judgment was entered against the plaintiff for costs of suit, and that judgment has been affirmed by the Appellate Court.

*As to the master's duty to instruct and warn inexperienced and ignorant employees, see foot-notes appended to *Central of Georgia Ry. Co. v. McClifford* (Ga.), 11 R. R. R. 457, 34 Am. & Eng. R. Cas., N. S., 457.

†As to the master's duty to warn and instruct servants, see foot-note appended to *McMillan v. Grand Trunk Ry. Co.* (C. C. A.), 12 R. R. R. 712, 35 Am. & Eng. R. Cas., N. S., 712.

There is no substantial controversy between the parties as to the facts. The deceased was killed at Carmi shortly after 2 o'clock in the morning of April 5, 1902. At the place of the accident there were two railroad tracks, known as the "passing track" and the "stock track," which were used jointly by the defendant and the Louisville & Nashville Railroad Company. On the morning preceding the accident the defendant placed two empty stock cars upon the stock track in position to be loaded. Later in the day the Louisville & Nashville placed on the west end of that track one of its cars, No. 5,596, and in doing so moved the two stock cars east beyond the stock chute, where they were to be loaded. When the stock men got ready to load their cars, they notified the agent of the defendant of this fact, and requested him to have the cars again placed in position; but he neglected or refused to do so, and about 4 o'clock in the afternoon they themselves pushed the stock cars back to the chute, in order to load their stock, in doing which they pushed car No. 5,596 west to a point where it obstructed the passing track. After the stock cars were loaded they were left opposite the chute, and car No. 5,596 left so as to still obstruct the passing track. The defendant had been notified, through its agent, that the car had been placed upon the stock track, but had no actual notice that it obstructed the passing track until about 11 o'clock p. m. of that day, when its agent went into the yards to seal the stock cars, and then discovered the obstruction, and immediately telegraphed the fact to the train dispatcher of defendant at Mt. Carmel, who thereupon, through the operator at Harrisburg, a station south of Carmi, notified the conductor of a freight train coming north, on which Rogers was fireman, that a car blocked the track at Carmi, to govern his train accordingly, and, upon reaching there, to remove the obstruction. That message was delivered to the conductor upon the arrival of his train at Harrisburg about midnight, and the train proceeded north, arriving at Carmi at 15 minutes after 2 o'clock on the morning of the 5th. It was stopped some distance south of the obstruction, where the engine was detached and run up to within about 40 feet of the obstructing car. The brakeman threw the switch to allow it to run onto the passing track. The deceased was at his place on the left side of the engine, looking out of the cab window for signals from the head brakeman. After the switch had been thrown, the engineer asked deceased if everything was ready, and he replied, "Go ahead." The engineer opened the throttle, and moved up about one revolution of the wheels, when he heard a brushing noise. He immediately called to Rogers, and, receiving no answer, stopped the engine and went over to him. He found his head crushed between the widow and the obstructing car, which caused his death almost immediately.

The only evidence in the record as to notice to the train

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crew, of which the deceased was fireman, was as follows: The conductor testified that he got an order at Harrisburg from the train dispatcher, as follows: "96. Understand men loading stock at Carmi let car run down, blocking west end of passing track. Please be governed, and clear it. E. A. T." Train orders always come in duplicate; special orders do not. E. A. Tulong, dispatcher at Mt. Carmel, testified: "About 11 p. m., April 4th, message reached our office stating, in substance, that men loading stock at Carmi had left a car blocking west end of passing track. In five minutes thereafter I sent to Harrisburg a message, as follows: [Repeating the dispatch as testified to by the conductor.] All orders for movements of trains are in duplicate, but notice to trainmen of danger is not duplicated. I know what the general custom is in regard to giving notice to trainmen of danger. * * *

It is the general custom to give notice, but not in duplicate, to the conductor of the train only, and it is his duty to notify the rest of the trainmen of the danger." Thomas Reynolds, superintendent of the defendant, testified that the general custom in regard to giving trainmen notice of dangerous obstructions on the line of the road was "to give but a single notice to conductors, and to no other of the trainmen. It is the conductor's duty to give notice to train crew." There is in this record an entire absence of proof that the conductor of the freight train informed the engineer or the deceased of the receipt of the dispatch at Harrisburg, or that either of them had any warning whatever of the obstruction. Neither is it claimed that the general custom spoken of by the train dispatcher and superintendent of giving "but a single notice to conductors and to no other of the train men" was known to the deceased.

The principal ground of reversal relied upon is that the trial court erred in instructing the jury to find for the defendant. We do not understand it to be denied that the car No. 5,596 was an obstruction to the safe use of the passing track, and that the company had such knowledge of that fact as to require of it notice or warning to its employees who were required to use that track; and so the material question on this branch of the case is, did the defendant discharge that duty in such a manner as that it can be said, as a matter of law, it used reasonable diligence to notify the deceased of the danger? A railroad company owes the duty to its employees operating its trains to use reasonable care and diligence to provide a safe track on which to run its trains and to maintain the same free from obstruction. "Where the obstruction on or near the track is not placed there by the employer, then there is no breach of the employer's duty, unless it is affirmatively shown that the employer was guilty of negligence in not removing the obstruction, or was guilty of negligence in not warning the employee." 3 Elliott on Railroads, p. 2000, § 1269. Here we think there was such affirmative proof of

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the defendant's negligence in not warning the deceased of the obstruction which caused his death. Other questions, such as whether or not he was himself in the exercise of due care for his own safety, and whether or not he did see or could have seen the obstructing car, etc., were controverted questions of fact; and so, unless it can be said, as a matter of law, that the defendant used reasonable care and diligence to notify the deceased of the dangerous condition of the track at the point of the accident, it was error to direct the jury peremptorily to return a verdict for the defendant.

As we understand the argument of counsel for the defendant in error, the contention is that when the train dispatcher was notified of the existence of the obstruction, and promptly informed the conductor of the freight train upon which the deceased was a fireman, the company had discharged its legal duty to the train crew, and that the negligence of the conductor in failing to communicate that information to the fireman, Rogers, was the negligence of a fellow servant, for the consequences of which the company cannot be held liable, and hence a considerable portion of the argument on either side is devoted to the question whether or not the conductor of the train occupied the position of a vice principal to the company, or was only a fellow servant of the deceased. If the case turned upon the solution of that question, it would be easy of disposition; the rule being well settled in this state that the different members of a train crew, including the conductor, are, generally speaking fellow servants. But we are here confronted with a rule of law, applicable to the facts of this case and binding upon the defendant company, in no way affected or controlled by the fact that the conductor and the deceased were, at the time, fellow servants, and that the death of the latter was the result of the negligence of the former. When the defendant received information of the obstruction, it became its duty to use reasonable diligence to warn the deceased of the danger; and that duty was one which it could not relieve itself of by directing his fellow servant to perform it. It being a duty owing by the master to the servant, it could not delegate that duty to another, even though a fellow servant of the deceased, and absolve itself from liability for the injury resulting in consequence of the failure to communicate knowledge to deceased of the increased hazard. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215. In *Chicago, Burlington & Quincy Railroad Co. v. Avery*, 109 Ill. 314, it was said by this court (page 322): "The negligence of fellow servants is one of the ordinary perils of the service which one takes the hazard of in entering into any employment, but the master's own duty to the servant is always to be performed. The neglect of that duty is not a peril which the servant assumes, and where the performance of that duty is devolved upon a fellow servant the master's liability in respect thereof still

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remains." In *Chicago & Eastern Illinois Railroad Co. v. Kneirim*, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259, we again said (page 461, 152 Ill., page 325, 39 N. E., 43 Am. St. Rep. 259): "It is the duty of the company to exercise reasonable and ordinary care and diligence in providing and keeping in repair reasonably safe machinery and appliances for the use of its servants; and this is a continuing duty, requiring the company to exercise reasonable diligence and care in supervision and inspection. The delegation of that duty to an employee does not relieve the company from liability because of the negligence of that employee in the discharge of that duty." See, also, *Mobile & Ohio Railroad Co. v. Godfrey*, 155 Ill. 78, 39 N. E. 590; *Hess v. Rosenthal*, 160 Ill. 621, 43 N. E. 743. In the still later case of *Chicago & Alton Railroad Co. v. Eaton*, 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161, which was an action, like this, to recover for the death of the plaintiff's husband, an engineer, caused by a rail upon the track on which he was running having been removed without warning to him, we used the following language (page 445, 194 Ill., page 785, 62 N. E., 88 Am. St. Rep. 161): "It was the duty of appellant to furnish the deceased a reasonably safe track upon which to operate his engine, and it could not delegate that duty. Neither could it delegate the duty of notifying the deceased that the rail had been removed, so as to absolve itself from liability for a failure to communicate such information to the deceased"—citing authorities. "The law imposes upon the master certain duties which concern the safety of his servants, and while he may, of course, delegate the duties to another, his doing so in no wise affects his responsibility for their proper performance. If one servant is injured by reason of the negligent performance of one of these duties by another servant, to whom it has been delegated by the master, the master cannot escape liability on the ground that the negligence was that of a fellow servant. In other words, where a servant is intrusted with the performance of one of the master's personal duties, he is, with respect to that duty, a vice principal or representative of the master, who will be liable to another servant for the negligent performance by the vice principal of the delegated personal duty to the same extent as for his own negligence." 12 Am. & Eng. Ency. of Law, p. 946.

It is clear from these authorities, and none are cited to the contrary, that the defendant wholly failed to prove that it performed its legal duty to warn plaintiff's intestate of the known obstruction upon the passing track which caused his death. We are also of the opinion that whether or not it was the duty of the defendant, under the circumstances of the case, in the exercise of due care, to warn its employees, exposed to the danger of the obstruction, to display a danger signal at the place, was a question which should have been submitted to the jury. On the whole record, it seems clear

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to us that the trial court was not authorized to take the case from the jury, but should, under proper instructions as to the law, have submitted the questions of fact to it for determination. The judgments of the circuit and Appellate Courts will accordingly be reversed, and the cause will be remanded to the circuit court for another trial.

Reversed and remanded.

KANSAS CITY, M. & B. R. CO. v. THORNHILL.

(Supreme Court of Alabama, May 31, 1904.)

[37 So. Rep. 412.]

Injury to Employee—Assumption of Risk.*

An employee does not assume perils arising from negligent directions of his foreman.

Same—Collision—Removing Hand Car from Track—Order of Foreman.†

In an action by a section hand for personal injuries, the complaint alleged that plaintiff and others were operating a hand car under the direction of the foreman, and that the latter negligently caused the car to run around a curve, where it was met by a locomotive, and that the car was stopped only a few yards in front of the locomotive, whereupon the foreman negligently ordered plaintiff and others to remove the car, which order plaintiff, being bound to obey and not having time to appreciate the danger, attempted to execute, when he was struck by the engine: *held*, that the complaint did not show upon its face that plaintiff was guilty of contributory negligence.

Issues—Pleading.

In an action against a railroad company for injuries to a section hand, alleged to have been caused by a negligent direction of plaintiff's foreman to remove a hand car from the track in front of an approaching train, a plea that plaintiff undertook to remove the car from the track, well knowing that the train was so close that it could not have been stopped before it struck the car, was objectionable as presenting a false issue; there being no allegation that the train could have been stopped.

Harmless Error.

In an action by a servant for personal injuries, refusal to allow a plea to be amended, so as to charge contributory negligence, was harmless, where two other pleas fully presented that defense.

Pleading—Duplicity.

In an action by a servant for personal injuries, a plea setting up both assumption of risk and contributory negligence is bad for duplicity.

Contributory Negligence—Question for Jury.†

In an action for personal injuries to a section hand, received while he was trying to remove a hand car from the track in front of an approaching train, in obedience to orders of his foreman, evidence *held* to justify submission of the issue of plaintiff's contributory negligence to the jury.

Contributory Negligence—Instruction Not Warranted by Facts.

Plaintiff and other section hands were riding on a hand car and passing through a cut, when they met a train. The hand car was stopped, and the men got off; and plaintiff afterwards, in obedience to orders

*See foot-note appended to *Missouri, K. & T. Ry. Co. of Texas v. Walden* (Tex.), 2 R. R. R. 294, 25 Am. & Eng. R. Cas., N. S., 294.

†See extensive note appended to *Illinois Cent. R. Co. v. Jones' Adm'r* (Ky.), 12 R. R. R. 372, 35 Am. & Eng. R. Cas., N. S., 372.

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of the foreman, attempted to remove the car from the track, and was injured while so doing: *held*, that an instruction that if, by the negligence of defendant, plaintiff was suddenly placed in a position of extreme peril, and thereupon performed an act, which under the circumstances known to him might seem proper, but which to those knowing all the facts and having time to consider them was not the best, he was not guilty of contributory negligence, was not applicable to the facts.

Contributory Negligence—Attempting to Remove Hand Car from Track—Failure to Watch Approaching Train.

Where a hand car on which a section crew was riding unexpectedly met a train, and one of the section hands was directed by the foreman to remove the hand car from the track, the fact that he did not, while doing so, watch the approaching train, did not show contributory negligence as a matter of law.

Measure of Damages—Instruction.

In an action for personal injuries, the court charged that the measure of damages was for the jury, but afterwards, on defendant's exception, stated that, in fixing the amount of damages, they might consider the evidence as to physical pain, and injury, if any, to the health of the plaintiff, but that the verdict must not exceed the amount claimed in the complaint: *held* erroneous, as authorizing an award of any amount less than that claimed, without reference to the damages actually sustained.

Sharpe, J., dissenting as to measure of damages.

Appeal from Law and Equity Court, Walker County; Peyton Norvell, Judge.

Action by J. A. Thornhill against the Kansas City, Memphis & Birmingham Railroad Company. From judgment for plaintiff, defendant appeals. Reversed.

This action was brought by the appellee, J. A. Thornhill, against the Kansas City, Memphis & Birmingham Railroad Company, and seeks to recover \$10,000 damages for personal injuries alleged to have been sustained by the plaintiff, and to have resulted from the negligence of the defendant or of its employees. As originally filed the complaint contained three counts, numbered 1, 2, and 3. Subsequently by amendment 5 other counts were added, designated as counts A, B, C, D, and E. The court sustained demurrers to counts numbered 1, 2, and 3, and to the count designated E, and during the trial of the case, after the introduction of the evidence, the court gave the general affirmative charge in favor of the defendant as to counts designated A, C, and D. It is therefore unnecessary to set out these counts, or the demurrers in reference thereto. After the demurrer was sustained to count numbered 1, the plaintiff amended said count, and there is presented, among other questions, for review on the present appeal, the rulings of the court upon demurrers to count numbered 1 as amended and count designated B.

The first count, as amended, was in words and figures as follows: "(1) The plaintiff claims of the defendant, a corporation, ten thousand dollars, for that heretofore, on, to wit, the 23d day of March, 1901, the defendant was operating, managing, and controlling a certain railway, known as the

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Kansas City, Memphis & Birmingham Railroad, through Walker county, Ala.; that said defendant was running cars for the transportation of freight and passengers over said road in Walker county, Ala., also was running lever or hand cars, for the purpose of keeping said road in repair; that on said date plaintiff was in the service of the defendant as a laborer, being a section hand, under one W. F. McAbee, who was foreman and in the employ of defendant; that on said date, while said McAbee was in charge of a certain lever or hand car and the plaintiff, together with other section hands, the said McAbee negligently caused said car to be run down a grade into a cut, around a curve, about one-half mile east from the Kansas City, Memphis & Birmingham depot at Jasper, and that in said cut and curve said lever car and section crew were met by a west-bound locomotive, and that the lever car was stopped only a few yards in front of the said west-bound locomotive, whereupon the said McAbee negligently ordered the plaintiff and others to remove said lever car from the track; that although said west-bound train was advancing, yet the said McAbee negligently and recklessly ordered said plaintiff to remove said lever car from the track, which order the plaintiff was bound to obey, and did undertake to obey, but without having time to understand and realize the danger in so obeying, and in attempting to carry out said order and remove said lever car from the track, he was struck by the engine of the west-bound train, which was being run by the servants of the defendant, and his legs, hips, back, head, and other parts of the body were so bruised and mangled that he was caused to suffer great mental and bodily pain, and has been forced to lose a great deal of time; and that the injuries caused by the said accident are permanent, and were proximate result of the negligence of said McAbee as aforesaid—to the damage of the plaintiff in the sum of \$10,000." Count B, after averring that the defendant was operating a railroad, etc., and that plaintiff was in its employ as a section hand, and was injured while so employed by being struck by one of defendant's engines, then alleges the negligence complained of as follows: "Plaintiff alleges that his said injuries were caused by the negligence of W. F. McAbee, a person in the employ of defendant, to whose orders plaintiff was bound to conform and did conform, and his said injuries resulted from his so conforming, to wit: That said W. F. McAbee negligently ordered plaintiff to remove the said hand car from the track in front of a rapidly approaching train, and in attempting to do so plaintiff was struck and injured aforesaid."

To the first count of the complaint as amended the defendant demurred upon the following grounds: "(1) For that the averments of said first count as amended show that the plaintiff was guilty of negligence which proximately contributed to his alleged injuries, in this: That he undertook to

remove the hand car from the track when it was only a few yards in front of the approaching or advancing locomotive or train. (2) For that the danger of undertaking to remove the hand car from the track in front of the approaching train was so obvious that, as averred in the count, it was recklessness on the part of the foreman to order the plaintiff to make such removal, and in the face of such obvious danger plaintiff ought not to have undertaken to remove the same. (3) The averments of the count show the plaintiff incurred the risk of an obvious peril, and that he assumed the risk of obeying an order recklessly given, when it is not averred that he was not aware of or he did not know the facts which made said order a reckless order. (4) There is no averment of any fact or facts that would have excused the plaintiff from the exercise of that care and prudence, to avoid his alleged injury, a reasonably prudent man would have exercised, under circumstances similar to those by which plaintiff was surrounded, when he undertook to obey the alleged order of the foreman. (5) The averments of the count show that the plaintiff's injuries were caused proximately by the negligence of the plaintiff in remaining on or dangerously near the track, after and when a reasonably prudent man would have left the track and desisted from the effort to remove the hand car therefrom." To count B the defendant demurred upon the following grounds: "(1) For that it appears from the averments of said count that the plaintiff's own negligence proximately contributed to his alleged injuries. (2) For that it appears from the averments of said count that the plaintiff assumed the risk of obeying the order alleged to have been given to him by W. F. McAbee. (3) For that said count is repugnant and inconsistent, in this: It is averred that plaintiff was bound to conform and did conform to an order alleged to have been given to him by W. F. McAbee, and other averments in said count show that plaintiff was not bound to conform to or obey such order."

The demurrers to count No. 1 as amended, and to count B, were overruled. Thereupon the defendant pleaded the general issue and the following special pleas: "(2) And for further answer to the complaint, and each count thereof, separately and severally, the defendant says that the plaintiff was himself guilty of negligence which proximately contributed to his said injuries, and that his said negligence consisted in this, to wit: That the plaintiff was upon a hand car or lever car going in an opposite direction to a train drawn by a locomotive on the track of defendant, and, when the car and the locomotive had approached each other to within a very short distance, plaintiff and others upon the lever car stopped the same and got off of it safely, and after getting off of it plaintiff *negligently* returned to the lever car and attempted to pull it from the track, well knowing that the said locomotive was rapidly approaching when he took

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hold of said car. (3) And for a further answer to the complaint, and to each count thereof, separately and severally, the defendant says that the plaintiff, after getting off of said lever car and getting into a place of safety, attempted to cross the track in front of the rapidly moving train, well knowing that the train was approaching rapidly, and that he was thereby guilty of negligence which proximately contributed to his alleged injuries. (4) And for a further answer to the complaint, and to each count thereof, separately and severally, the defendant says that the plaintiff undertook to move from the track the lever car, well knowing that the locomotive with train attached was rapidly approaching, and was, at the time he took hold of the car, within a very short distance of him, and within such a short distance that by the exercise of reasonable care the said locomotive could not have been stopped before it struck said lever car, whereby defendant says that the plaintiff assumed the risk of undertaking to move the said car. (5) And for a further answer to the said complaint, and each count thereof, separately and severally, the defendant says that the plaintiff was guilty of negligence which proximately contributed to his alleged injuries, and the defendant avers that such contributory negligence consisted in this: The plaintiff *negligently* went upon or dangerously near to the track of the defendant in front of a rapidly approaching train, and was there struck."

To plea numbered 2, the plaintiff demurred upon the following grounds: "(1) The said plea fails to show that plaintiff was guilty of any negligence after the engineer saw him. (2) The said plea fails to show plaintiff was guilty of any negligence which contributed to his injury after the engineer became aware of his perilous condition. (3) The said plea is no answer to the count B of the complaint, in that it fails to show that the danger to plaintiff was obvious in attempting to pull said lever car from the track. (4) The said plea is no answer to count B of the complaint, in that it fails to show that the plaintiff did not act as a man of ordinary prudence in attempting to pull said hand car from the track. (5) The said plea is no answer to count No. 1 of the complaint, in that it fails to show that plaintiff was negligent in executing the order of said McAbee. (6) The said plea is no answer to count No. 1 of the complaint, in that it fails to show that plaintiff's conduct in attempting to execute said order was not, under the circumstances, that of a reasonably prudent man." To pleas numbered 3 and 5 the plaintiff demurred upon the following grounds: "(1) Said plea does not allege that the injury was the proximate result of the acts set up in said plea. (2) Said plea does not allege that plaintiff's injury was caused by the attempt to cross the track. Said plea does not deny, nor confess and avoid, the allegations of count 1 or of count B. (4) Said plea does not state facts showing

that plaintiff took a position of obvious peril to men of ordinary prudence." To plea numbered 4 the plaintiff demurred upon the following grounds: "(1) Said plea does not allege that the locomotive could not have been slowed down to give plaintiff time to remove the car by the use of proper preventive means at the command of the engineer. (2) Said plea does not allege that plaintiff was guilty of any negligence that contributed proximately to his injury. (3) Said plea does not allege that plaintiff caused his injury by reason of taking hold of the hand car. (4) Said plea is no answer to the charge that plaintiff came to his injury while obeying an order that he was bound to obey, without the opportunity of knowing and realizing the peril of so obeying. (5) No sufficient facts are stated in the plea to show that plaintiff assumed the risk."

The court overruled the demurrer to plea No. 3, but sustained the demurrers to pleas numbered 2, 4, and 5. After this ruling the defendant amended pleas numbered 2 and 5 by inserting the word "negligently," which is italicized in said pleas as copied above. The defendant then also asked leave of the court to amend its special plea No. 4 by adding, after the words "struck said lever car," the following words: "Defendant avers that the danger to plaintiff in undertaking to remove from the track said lever car was so great that a man with ordinary prudence would not have voluntarily incurred it." The court refused to allow this amendment, and to this ruling the defendant duly excepted. The cause was tried upon issue joined on said pleas, as shown above.

The evidence introduced on the trial shows, without conflict, in substance, that on the morning of the 23d of March, 1901, the plaintiff was hurt about 1½ miles east of Jasper, on the defendant's railroad; that at the time he was hurt he was a section hand on said railroad, in the employment of the defendant, and McAbee was his foreman; that he was hurt between 6 and 7 o'clock in the morning; that he and other section hands under McAbee, and McAbee also, were proceeding east on a hand car or lever car, when they saw a train approaching from the east going west; that at the place where they met the west-bound train there was a curve and cut, the cut being about 10 feet deep, and it was 50 yards through it; that it was downgrade in the cut going west; that when plaintiff and those on the hand car first saw the approaching train it was about two "telegraph posts" from them, the distance between the post being differently estimated by the witnesses; that when they saw the approaching train McAbee gave orders to stop the hand car, and they did stop it, and all of them got off of the hand car; that at the time they got off the hand car the west-bound train was very near to the hand car, and was running 15 or 20 miles an hour; that, so soon as the engineer saw the hand car on the track, he

applied the air brakes and reversed his engine, and did all he could to stop his train, and did stop his train a few car lengths beyond the place where the engine struck the hand car and hit the plaintiff; that so soon as the hand car was stopped, and the plaintiff and the others on the hand car got off, instead of leaving the hand car on the track and seeking safety by flight, the plaintiff and some of the other hands on the car attempted to get the hand car off of the track, and while so attempting the plaintiff was injured by being struck by the engine, or by being struck by the hand car propelled against him by the engine. The evidence is in conflict as to whether McAbee ordered the plaintiff and the other section hands to take the car off the track; the evidence on behalf of the plaintiff, including his own, tending to show that he did give the order, while that introduced on behalf of the defendant tended to show that he did not give the order. The plaintiff's own testimony, as well as that of his other witnesses, shows that he did get off of the car before the car was struck by the engine, and could have saved himself, as the other hands with him saved themselves, by running up the embankment.

Among the several portions of the court's general charge, to which the defendant separately excepted, was the following: "But if, from the evidence, you believe that by the negligence of the defendant the plaintiff was placed in a position in which he was suddenly confronted with extreme and imminent peril, necessitating to his extrication quick decision and action on his part, he will not be held to the same correctness of judgment and action as if he had time and opportunity to fully consider the situation and to choose the best means of escaping the peril, or, in other words, adopting the formulation of a principle which has been approved by the law, where by the negligence of the defendant, or those for whom it is responsible, the plaintiff has been suddenly placed in a position of extreme peril, and thereupon does and act which, under the circumstances known to him, you might reasonably think proper, but which those who have a knowledge of all the facts, and time to consider them, were able to see was not in fact the best, the defendant cannot insist that under these circumstances the plaintiff has been guilty of negligence." Among the many charges requested by the defendant, and to the court's refusal to give each of which the defendant separately excepted, was the following: "(N) If the jury believe, from the evidence, that the hand car was stopped within 150 yards of the hand car from the approaching engine with a train attached, and plaintiff attempted to remove the hand car, without looking to see how close the engine was approaching to the hand car while attempting to remove the hand car, then plaintiff is guilty of contributory negligence, and cannot recover, although you may believe

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that W. F. McAbee, foreman, ordered plaintiff and others to remove the hand car."

The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. There were verdict and judgment in favor of the plaintiff, assessing his damages at \$7,500. The defendant appeals, and assigns as error the rulings of the trial court upon the pleadings, and the other many rulings of the trial court, to which exceptions were reserved.

Walker, Tillman, Campbell, and Walker, for appellant.

Acuff and Acuff, S. Lacey, and Coleman & Bankhead, for appellee.

McCLELLAN, C. J. The assignments of demurrer to the first count of the complaint do not go to the sufficiency of its averments in respect of McAbee's dominance of the plaintiff in the service of the defendant. It does appear by the count that McAbee was the foreman, and that plaintiff was under him, and that this relation between them existed in the service of the defendant, and, further, that plaintiff was bound to obey the alleged negligent order of McAbee. If it were supposed that the count should have alleged McAbee's particular foremanship, the scope of it, and plaintiff's relation to such foremanship, or that the count should have averred that plaintiff was "bound to conform and did conform to" McAbee's orders, the demurrer should have pointed out these defects.

We are not of opinion that the averments of count 1 show either that Thornhill, the plaintiff, assumed the risk incident to attempted obedience of McAbee's order, whereby he was injured, or that he was guilty of negligence contributing to his injury in attempting to obey the order. The first proposition, that he did not assume such risk, is satisfactorily supported by the reasoning and authority of the case of *Schroeder v. Chicago & Alton Railroad Co. (Mo.)* 18 S. W. 1094, 18 L. R. A. 827. Upon the other question, viz., whether the count shows contributory negligence on Thornhill's part, several considerations are pertinent. In the first place, the act of McAbee in giving the order and the attempt of Thornhill to obey it are not to be judged, in respect of negligence vel non, by the same standards. McAbee had more time and better opportunity to consider whether he would or should give the order than Thornhill had, after it was given, to determine whether he would enter upon its execution. Then, too, though the danger of attempting to obey the order may be conceded to be shown by the count to have been apparent to Thornhill, as well as to McAbee, it cannot be said as matter of law to have been so obvious and imminent upon the facts averred as that no prudent man would have made the attempt—according, even in the face of such danger, something to Thornhill's duty and habit of obe-

dience; something to the lack of time for him to consider the situation and to determine his action advisedly, especially as this sudden emergency was itself the product of McAbee's negligence; something to his probable and not unreasonable assumption that McAbee would seasonably warn him from the attempt; and yet something more to his probable belief that the removal of the car from the track was necessary for the safety of the trainmen, a consideration which might justify his making and persisting in the attempt to any extent short of rashness, but which, we apprehend, would not avail to acquit McAbee of negligence in giving the order, for whether such extreme risk should be taken to save human life would seem to be a question personal to the man who is to take or to avoid it. On these considerations we are come to the conclusion that the first count does not show that the plaintiff was guilty of contributory negligence barring a recovery. *Louisville & Nashville Railroad Co. v. Orr*, 121 Ala. 489, 500, 26 South. 35; *Southern Ry. Co. v. Guyton*, 122 Ala. 231, 25 South. 34; *Roll v. Northern Central Ry. Co.*, 15 Hun, 496; *Schroeder v. Chicago & A. R. R. Co. (Mo.)* 18 S. W. 1094, 18 L. R. A. 827; *Stephens v. Hannibal & St. J. R. R. Co.*, 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336.

Some of the foregoing considerations apply with like force and effect to count B, and lead to the same conclusion—that that count is not open to the objection that it showed contributory negligence by plaintiff. We attach no importance to the use of the word "recklessly" in conjunction with the word "negligently, in characterizing McAbee's order, in the first count, nor to the omission of that word from count B. It would no more follow, on the facts averred, that Thornhill was reckless because of the averment that McAbee was reckless, than that the former was negligent because it is averred that the latter was negligent. The use of the two words may, indeed, be taken to mean only negligence.—*Kansas City, Memphis & Birmingham Railroad Co. v. Crocker*, 95 Ala. 433, 11 South. 262.

We have stated our opinion, and the grounds of it, to the effect that plaintiff was not necessarily guilty of negligence in his attempt to remove the hand car, for that he knew the train was near and approaching, and this conclusion covers also the action of the court in sustaining the demurrer to the second plea.

Plea 4 presents a false issue, in a sense. It was not a question whether the train could be stopped before it reached the point where the hand car was. There was no pretense that it could. But the question was whether there was such probability or possibility of removing the hand car from the track before the train reached that point as justified the attempt to remove it. For the rest, what is said of plea 2 applies also to this plea and to plea 5.

Pleas 2 and 5 as amended, and plea 3, which the court held good, fully presented the defense of contributory negligence in Thornhill's undertaking to remove the hand car, and therefore defendant was not prejudiced by the disallowance of its proposed amendment of plea 4, which would have converted that plea, also, into one of contributory negligence. Moreover, the proposed amendment would have rendered the plea bad for duplicity, had it been otherwise a good plea. As amended it would have set up both assumption of risk and contributory negligence. And, furthermore, the amendment was properly disallowed, all other considerations aside, under section 33 of the "Act to establish the Walker county law and equity court." Acts 1900-01, p. 121.

On the evidence adduced at the trial Thornhill was not in a position of peril to himself when he received the order to remove the hand car from the track and determined upon attempting to execute that order. That order was given after the hand car had been stopped, and after Thornhill, along with the other members of the crew, had got off of it, and when he and they were standing on or near the track about the car. In this position he had merely to step aside to avoid all danger from the approaching train. The train was then 150 yards away, affording ample time for him to get entirely out of all danger from it. That he could do so was perfectly obvious to the perceptions and comprehension of any man in his senses. He was not hurt in consequence of being at that time in that position, but in consequence of going and remaining on the track in an effort to remove the car therefrom. He was not hurt in an effort to extricate himself from peril, but in an effort to conserve the safety of defendant's property and trainmen. He was not put to a sudden choice of means, hurried and confused the while by a sense of his own peril, to save himself, but only to a sudden decision whether he would incur the risk of attempting to obey McAbee's order or would avoid all risk by disobeying it. He had escaped all the danger to himself growing out of McAbee's negligence in running the hand car on the time of an approaching train going in the opposite direction without safeguard against collision, and was in a place of safety in respect of such threatened collision. From this point of vantage, he entered upon a course involving a new risk; not the risk of the running car with him on it colliding with the train, but the risk of removing the car after he had gotten clear of it. The "doctrine, fully approved by this court, to the general effect that where the party injured was suddenly placed by the wrong of the defendant in a position of extreme and imminent peril, necessitating to his extrication quick decision and action on his part, he will not be held to the same correctness of judgment and action as if he had time and opportunity to fully consider the situation and to choose the best means of escaping the peril; or, in other words,

* * * where by the negligence of the defendant, or those for whom he is responsible, the plaintiff has been suddenly placed in a position of extreme peril, and thereupon does an act which under the circumstances known to him he might reasonably think proper, but which those who have a knowledge of all the facts, and time to consider them, were able to see was not in fact the best, the defendant cannot insist that under the circumstances the plaintiff has been guilty of negligence" (Woodward Iron Co. v. Andrews, 114 Ala. 243, 21 South. 440), does not apply to the facts of this case. To the contrary, but for considerations to be presently adverted to, the principles declared in Central of Georgia Ry. Co. v. Foshee, 125 Ala. 199, 215, 216, 27 South. 1006, 1011, would apply to the case at bar. It was there said: "The intestate, when she started upon the act [crossing the track in front of an approaching train] which cost her her life, was not in a position of peril, extreme or otherwise. She was, to the contrary, in an absolutely safe position; and not only was it safe in point of fact, but it was obviously so to the perception and comprehension of any ordinary man. Any ordinary man or woman, standing, as she was, by the side of the track, and out of the way of the approaching locomotive, when she saw the train, * * * would have known that that was a place of safety, and would have had no hesitation or doubt as to the propriety of remaining there. * * * As no man of ordinary care and prudence would have attempted to rush from a place of safety across the track in front of this locomotive, the act must be held negligent and rash on the part of the intestate. It is of no consequence that she was panic-stricken, and hence thought she was in danger, and that that was her only means of escape. She must have been in danger, which she was not; and she must have reasonably thought the course she took was the best, which she could not have done, since there was no ground for so thinking. The plaintiff cannot hold the defendant responsible for the results of her unwarranted panic."

The considerations which prevent the application of the doctrine of the Foshee Case to the case at bar, and which yet do not prevail to bring it within the Woodward Iron Co. v. Andrews Case, are that Thornhill was ordered by his superior to remove the car; that he might reasonably have expected McAbee would warn him to desist from that effort in time to escape injury; that defendant's property and the lives of defendant's trainmen were in danger; that it was his duty to conserve the safety of the trainmen and of the property, if the car could be removed with safety to himself; that, to save the trainmen from the dangers of a collision and the possible consequent derailment and wreck of their train, he was justified in taking extra hazards; and that he had to determine upon the instant whether he would enter upon the executions of the order. These considerations made the

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question of his negligence *vel non* in going from a safe position into the dangerous one, where he received his injuries, one for the jury's determination, and one upon which the court could not give the affirmative charge for the defendant, as this court held should have been given in the Foshee Case; and therein lies the difference between the two cases. But, as we have said, these considerations do not avail to make a case within the doctrine of Woodward Iron Co. v. Andrews. There was danger here, but it was not danger to the life or limb of Thornhill. He was not put suddenly, by defendant's fault or otherwise, to decision and action to his own extrication from peril, because he was in no peril. But there was suddenness of danger to property and to the lives of others. There were calls upon him to avert that danger. To avert it, immediate decision whether he would respond to these calls, and immediate action, if any action could avail, was necessary. All these circumstances were for the jury's consideration in arriving at a conclusion whether he was guilty of negligence. But, we repeat, none of them, nor all of them combined, nor anything other in the evidence, presents a case for the application of the principle that one placed by the fault of another in a position of extreme and imminent peril, and under necessity to instantly choose his course and act, cannot be held to the same correctness of decision and action as one who knows all the facts and has time to consider them unharried by his own peril. And yet it was this principle, couched in the language of its formulation in the Andrews and Foshee Cases, that the court gave in charge to the jury as that upon which the issue of contributory negligence presented by the pleas to count 1 was determinable, and afterwards refused an instruction, requested by the defendant, that "the principle of law the court in its oral charge to the jury referred to as to one being placed in sudden peril by the negligence of the defendant, or of those for whose acts the defendant is responsible, had no application to the first count of the complaint." The court should not have so instructed the jury in its oral charge. But, having done so, it should have corrected itself by giving this charge requested by the defendant. Its refusal was error.

The affirmative charges requested by the defendant as to counts 1 and B (all other counts going out by demurrer or charges)—among which may be reckoned many requests which were in effect, but not in form general affirmative charges—which were asked on the theory that the evidence showed without conflict that the plaintiff was guilty of negligence proximately contributing to his injury, were properly refused on considerations already adverted to. It was a question for the jury whether a man of ordinary care and prudence would have attempted to remove the hand car from the rails under all the circumstances. Assuming that the issue of neg-

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ligence vel non on the part of plaintiff in not desisting from the effort to remove the car in time to avoid being struck by the train was presented by the pleas of contributory negligence—as to which, *quære*, *Southern Ry. Co. v. Shelton*, 136 Ala. 191, 34 South. 194—the substance of the charge bearing on that issue, refused to defendant, was embodied in other instructions given at defendant's request.

Charge N, refused to defendant, is somewhat confused in language. But, apart from that consideration, it was properly refused. It cannot be said as matter of law that the failure of Thornhill to keep an eye on the approaching train while he was attempting to remove the hand car was negligence. The act he was upon was of such exigent nature, necessitating such immediate action, that, having in mind the position of his body with reference to the train, the jury might have concluded that it was not negligence in him to give his whole attention to the doing of it, looking to Mc-Abee for timely warning to desist.

In its general charge, given of its own motion, the court instructed the jury as to the measure of damages in these words only. "What the measure of damages, if any, is for you to say. In this the court can give you no assistance." To this the defendant excepted at the conclusion of the charge, and thereupon the court said this more to the jury: "Now, gentlemen of the jury, I desire to make a correction as to a part of the charge which I gave you as to the measure of damages. I said that what the measure of damages is, is for you to say; that in that the court could give you no assistance. I will correct this by saying: I charge you that, in fixing the amount of damages, if you find for the plaintiff, you may take into consideration the evidence as to physical pain, and injury, if any, to the health of the plaintiff; but in no event must your verdict exceed the amount claimed in the complaint." The original statement of the judge and his correction were both before the jury. Written into each other, the instruction is this: "What the measure of damages, if any, is for you to say. The court can assist you by saying that in fixing the amount of damage, if you find for the plaintiff, you may take into consideration the evidence as to physical pain and injury, if any, to the health of plaintiff, but in no event must the verdict exceed the amount claimed in the complaint." The manifest tendency of this charge was to lead the jury to conclude that the only limitation upon the amount of their verdict was the sum stated in the complaint, and that within that figure they were free to find any amount, regardless of all consideration of the damages actually sustained by the plaintiff. The jury should have been instructed to find from the evidence a sum which in their judgment would compensate the plaintiff for the injuries he suffered, not in excess of the amount claimed. Instead, they might well have concluded that they could re-

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turn any amount their caprice might suggest, not beyond the complaint, without reference to the evidence. The original instruction should not have been given, and it was not helped by the attempted correction.

Reversed and remanded.

SHARPE, J., concurs in the result, but does not agree that there is any impropriety in the charge with reference to the measure of damages.

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- Custom of allowing passengers to ride on running board admissible in evidence upon question of negligence. *Stone v. Lewiston, B. & B. St. Ry.* (Me.), 240.
- Similar accidents caused by jolting on same part of track. *Nashville R. R. v. Howard* (Tenn.), 75.
- Failure of employee to assist children to board train, obliging their mother to assist them, was not the proximate cause of injury sustained by mother while attempting to alight from the train after it started. *Flaherty v. Boston & M. R. R.* (Mass.), 246.
- Invitation to alight from street car, sufficiency of evidence. *Topp v. United Rys. & Electric Co. of Baltimore* (Md.), 248.
- Liability for death of passenger was a question for jury, under death statute of Missouri. *O'Brien v. St. Louis Transit Co.* (Mo.), 413.
- Liability where prospective passenger, after his wrongful ejection from car, was injured by rail charged with electricity, as he was walking back to his home at night. *Anderson v. Seattle-Tacoma Interurban Ry. Co.* (Mass.), 380.
- Negligence question for jury where passenger was run into by car while transferring from one car to another. *Walger v. Jersey City, H. & P. St. Co.* (N. J.), 226.
- Negligence question for jury where street car passenger, while riding on steps, after being warned by motorman, but not by conductor, who saw him, was struck by car on opposite track, at a curve, while the cars were being run in violation of a rule of the carrier. *Parks v. St. Louis & S. Ry. Co.* (Mo.), 387.
- Pleading contributory negligence and assumption of risk, in action for injury to street car passenger, sustained while he was riding on steps, from collision with a car on other track. *Parks v. St. Louis & S. Ry. Co.* (Mo.), 387.
- Presumption of negligence from accident to passenger. *Lincoln Traction Co. v. Webb* (Neb.), 369.
- Presumption of negligence from killing of passenger. *Lincoln Traction Co. v. Heller* (Neb.), 368.
- Refusal to charge that passenger could not recover unless she

CARRIERS OF PASSENGERS—Continued.

satisfied the jury, by testimony of greater weight, that the accident happened because of sudden starting of car after it came to full stop in response to her signal, was error. *Dambmann v. Metropolitan St. Ry. Co. (N. Y.)*, 437.

Safe place to alight, negligence in failing to furnish. *Topp v. United Rys. & Electric Co. of Baltimore (Md.)*, 248.

Who Are Passengers.

Shipper's employee a passenger, so as not to a fellow servant of the engineer of the train. *Holmes v. Birmingham Southern R. Co. (Ala.)*, 815.

Transferring from one street car to another. *Walger v. Jersey City, H. & P. St. Ry. Co. (N. J.)*, 226.

CARS.

See MASTER AND SERVANT.

CAR SERVICE ASSOCIATION.

See CARRIERS OF GOODS; MONOPOLIES.

CAR STARTER.

See FELLOW SERVANTS.

CASHIERS.

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CATTLE.

See STOCK, INJURIES TO.

CATTLEGUARDS.

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CAUSAL CONNECTION.

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CHANGED CONDITIONS.

See EVIDENCE.

CHARGES.

See CARRIERS OF GOODS.

CHILDREN.

See INJURIES TO PROPERTY; PERSONAL INJURIES; WITNESSES.

Care due boy under cars, attempting to recover his hat, who was a trespasser in the railroad yards. *Wagner v. Chicago & N. W. Ry. Co. (Iowa)*, 749.

Care due child trespassing on railroads tracks. *Nashville, etc., Ry. Co. v. Harris (Ala.)*, 562.

Care required of motorman to avoid injuring child approaching track. *Indianapolis St. Ry. Co. v. Schomberg (Ind.)*, 627.

Child, too young to be chargeable with contributory negligence, as a trespasser on tracks. *Nashville, etc., Ry. Co. v. Harris (Ala.)*, 562.

Contributory Negligence.

Effect of infancy of plaintiff. *Nashville, etc., Ry. Co. v. Harris (Ala.)*, 562.

Care required of child non sui juris to avoid street car. *Indianapolis St. Ry. Co. v. Schomberg (Ind.)*, 627.

Child was not guilty of negligence in attempting to cross track in front of approaching street car. *Cameron v. Duluth-Superior Traction Co. (Minn.)*, 632.

CHILDREN—Continued.

- Parents of child injured by street car were not negligent in entrusting it to older sister. *Cameron v. Duluth-Superior Traction Co.* (Minn.), 632.
- Where a minor was injured while jumping from a moving street car, by the direction of the motorman, as plaintiff claimed, an ordinance making it a misdemeanor to jump from a moving street car was admissible in evidence. *Denison & S. Ry. Co. v. Carter* (Tex.), 129.
- Crossing signals, failure to give was not cause of child coming on track, where it appeared that she walked along track towards train after seeing it. *Nashville, etc., Ry. Co. v. Harris* (Ala.), 562.
- Duty to look for children trespassing under cars in railroad yards. *Wagner v. Chicago & N. W. Ry. Co.* (Iowa), 749.
- Evidence showed negligence on part of motorman in not stopping car when child was seen approaching track. *Indianapolis St. Ry. Co. v. Schomberg* (Ind.), 627.
- Imputed negligence, negligence of mother could not prevent recovery for injury to child thrown from car by sudden jolt, as the latter was without fault. *Nashville R. R. v. Howard* (Tenn.), 75.
- Infancy, effect on relations between parties. *Atlanta & W. P. R. Co. v. West* (Ga.), 548.
- Liable for injury to minor permitted to ride on street car by motorman, without authority, in consideration of certain services. *Denison & S. Ry. Co. v. Carter* (Tex.), 129.
- Negligence of driver was not imputable to infant not quite fourteen years of age, riding with him, and injured in a crossing accident. *Hampel v. Detroit, etc., Ry. Co.* (Mich.), 732.
- Negligence on part of motorman in failing to anticipate danger of child approaching street car track. *Cameron v. Duluth-Superior Traction Co.* (Minn.), 632.
- Proximate cause of injury to boy riding on street car by permission of motorman was his attempt to alight from moving car at motorman's direction, and not the act of the motorman in permitting him to ride on the front platform. *Denison & S. Ry. Co. v. Carter* (Tex.), 129.
- Volunteers, infancy of one of them cannot change relations between parties. *Atlanta & W. P. R. Co. v. West* (Ga.), 548.
- Where a minor was injured while attempting to alight from the front platform of a moving street car, it was not actionable negligence on the part of the company to permit him to ride on the car, as distinguished from a place on the car which was especially dangerous. *Denison & S. Ry. Co. v. Carter* (Tex.), 129.
- Wilfulness or wantonness, insufficiency of evidence, in action for injury to child on track. *Nashville, etc., Ry. Co. v. Harris* (Ala.), 562.

CHOOSING DANGEROUS POSITION.

See MASTER AND SERVANT.

CHOOSING MORE DANGEROUS METHOD.

See MASTER AND SERVANT.

COAL CHUTES.

See MASTER AND SERVANT.

COLLISIONS.

See ACCIDENTS ON TRACKS; STREET RAILWAYS.

COLLISIONS WITH WAGONS.

See CARRIERS OF PASSENGERS.

COMBINATIONS IN RESTRAINT OF TRADE.

See MONOPOLIES.

COMPETING LINES.

See EMINENT DOMAIN.

COMPLAINT OF PAIN.

See EVIDENCE.

CONCURRING NEGLIGENCE.

See FELLOW SERVANTS; NEGLIGENCE.

CONDUCTORS.

See FELLOW SERVANTS; MASTER AND SERVANT.

CONNECTING CARRIERS.

See CARRIERS OF GOODS; INTERSTATE COMMERCE.

Limiting Liability.

Liability limited to own line, application of Kansas statute requiring initial carrier to show how loss of, or damage to, freight on connecting line occurred. *Atchison, etc., Ry. Co. v. Canton Milling Co.* (Kan.), 422.

CONSIDERATION.

See SPURS AND SIDETRACKS.

CONSOLIDATION.

See EMINENT DOMAIN; RAILROADS.

CONSTITUTIONAL LAW.

See BRIDGES; CARRIERS OF GOODS; CRIMINAL LAW; EMINENT DOMAIN; LICENSES; MONOPOLIES; RAILROADS IN STREETS; STOCK, INJURIES TO; TAXATION.

CONTEMPLATION OF PARTIES.

See CARRIERS OF GOODS.

CONTINUOUS LINE.

See TAXATION.

CONTRACTORS.

See FELLOW SERVANTS.

CONTRACTS.

See RIGHT OF WAY; SPURS AND SIDE TRACKS; STATIONS AND DEPOTS.

CONTRIBUTORY NEGLIGENCE.

See ACCIDENTS ON TRACK; CROSSINGS; DEATH BY WRONGFUL ACT; EVIDENCE; MASTER AND SERVANT; STATIONS AND DEPOTS; STREET RAILWAYS.

Admission by failure to traverse in reply, effect of allegation of due care on part of deceased in amended petition. *Louisville & N. R. Co. v. Paynter's Adm'x* (Ky.), 140.

Allegation of contributory negligence in answer was new matter, which was admitted by failure to traverse by a reply. *Louisville & N. R. Co. v. Paynter's Adm'x* (Ky.), 140.

Duty to avoid consequences of defendant's negligence. *Atlanta, etc., Ry. Co. v. Gardner* (Ga.), 602.

Insufficiency of allegation. *Mobile J. & K. C. R. Co. v. Bromberg* (Ala.), 823.

Intoxication does not relieve a man from the degree of care required of a sober man in same circumstances. *Vizacchero v. Rhode Island Co.* (R. I.), 172.

Question for jury. *Foster v. New York, N. H. & H. R. Co.* (Mass.), 343.

Whether question for jury. *Topp v. United Rys. & Electric Co.* of Baltimore (Md.), 248.

CONVERSION.

See CARRIERS OF GOODS.

CORPORATIONS.

See MONOPOLIES; NEGLIGENCE.

COUPLING CARS.

See MASTER AND SERVANT.

COVENANT OR CONDITION.

See RIGHT OF WAY.

CRIMINAL LAW.

Obstructions on track, criminal offense, under Wisconsin statute, regardless of intent. *State v. Bisping* (Wis.), 57.

Obstructions on track, unusual or excessive punishment for placing not prescribed by Wisconsin statute. *State v. Bisping* (Wis.), 57.

Placing obstructions on track, immaterial allegations in indictment, under Wisconsin statute. *State v. Bisping* (Wis.), 57.

CROSSINGS.

See ACCIDENTS ON TRACK; CHILDREN; FELLOW SERVANTS; RAILROADS IN STREETS; STREET RAILWAYS.

Care required of motorman and driver of vehicle, where view is obstructed, when approaching a crossing. *Dungan v. Wilmington City Ry. Co.* (Del.), 746.

Contract between railroad and private persons for permanent maintenance of grade crossings over certain streets, right of specific performance subject to interests of the public and police power. *Swift v. Delaware, L. & W. R. Co.* (N. J.), 669.

Contributory Negligence.

Burden of proving gross carelessness of deceased, in action based on Mass. Rev. Laws, c. 111, § 268, requiring crossing signals to be given. *McDonald v. New York Cent. & H. R. R. Co.* (Mass.), 125.

Burden of proving gross carelessness on part of deceased. *Brusseau v. New York, N. H. & H. R. Co.* (Mass.), 157.

Conductor of street car, who had alighted to see that track was clear, and killed by a train which he should have seen in time, while unnecessarily standing on the steam railroad track, was guilty of, as matter of law. *Dunworth v. Grand Trunk Western Ry. Co.* (C. C. A.), 196.

Driver of wagon struck by train was guilty of. *Van Riper v. New York, S. & W. R. Co.* (N. J.), 162.

Driving over street car tracks, after seeing approaching car, without looking again until too late. *Goldmann v. Milwaukee Electric Ry. & L. Co.* (Wis.), 582.

Driving through open crossing gates. *Sager v. Atchison, T. & S. F. Ry. Co.* (Kan.), 670.

Gross carelessness of boy seven and one-half years of age, sufficiency of evidence where no one saw accident. *McDonald v. New York Cent. & H. R. R. Co.* (Mass.), 125.

Instruction properly refused because it was apt to mislead jury by emphasizing duty of plaintiff with regard to the exercise of due care, thereby drawing the jury's attention to particular facts. *Chicago & E. I. R. Co. v. Coggins* (Ill.), 144.

Of motorman, injured in collision between his car and train, when his attention was diverted in looking for signals from his conductor. *McLeod v. Chicago & N. W. Ry. Co.* (Iowa), 715.

Presumption of due care on part of person injured. *Golinvaux v. Burlington, C. R. & N. R. Co.* (Iowa), 185.

CROSSINGS—Continued.

- Question for jury. *Barnum v. Grand Trunk Western Ry. Co.* (Mich.), 752.
- Question for jury whether plaintiff was guilty of gross negligence. *Brusseau v. New York, N. H. & H. R. Co.* (Mass.), 157.
- Sufficiency of evidence. *Lambert v. Southern Pac. R. Co.* (Cal.), 575.
- Testimony of person that when approaching a street railway track he looked along it for a car, and did not see one, was improbable. *Lightfoot v. Winnebago Traction Co.* (Wis.), 1.
- Time of using due care, instructions. *Chicago & E. I. R. Co. v. Coggins* (Ill.), 144.
- Defects, sufficiency of evidence of implied notice to company. *Hughes v. Chicago St. P., M. & O. Ry. Co.* (Wis.), 727.
- Defendant was not liable on the ground that by the exercise of ordinary care its trainmen might have avoided the consequence of decedent's negligence, after the discovery of his peril. *Dunworth v. Grand Trunk Western Ry. Co.* (C. C. A.), 196.
- Duty to maintain crossing in safe condition for pedestrians. *Hughes v. Chicago, etc., Ry. Co.* (Wis.), 787.
- Fact that trainmen were guilty of noncompliance with statutory regulations did not preclude their company from relying on defense of contributory negligence. *Dunworth v. Grand Trunk Western Ry. Co.* (C. C. A.), 196.

Farm Crossings.

- Duty of determining kind of crossing to be constructed is imposed on railroad company, under Iowa Code 1873, § 1268. *McLeod v. Chicago & N. W. Ry. Co.* (Iowa), 715.

Gates.

- Open gate as an assurance of safety. *Sager v. Atchison, T. & S. F. Ry. Co.* (Kan.), 670.
- Person not required to be on his guard against danger of being struck by gate through negligence of gate keeper. *Sager v. Atchison, T. & S. F. Ry. Co.* (Kan.), 670.
- Jury must necessarily have found that plaintiff's foot was caught and held until he was struck by engine. *Hughes v. Chicago St. P. M. & O. Ry. Co.* (Wis.), 787.
- Lookout, duty of trainmen. *Hughes v. Chicago, St. P. M. & O. Ry. Co.* (Wis.), 787.
- Mutual rights and duties of those in charge of street cars and other users of streets. *Birmingham Ry. L. & P. Co. v. Oldham* (Ala.), 165.
- Negligence could not be inferred from mere fact that engine inflicting injury was backing across street immediately after passage of train. *Barnum v. Grand Trunk Western Ry. Co.* (Mich.), 752.
- Presumption of negligence on part of motorman was created by evidence showing that vehicle driven along track was struck from rear by sprinkling car from which motorman, as he alleged had been knocked off by electric shock. *Chicago City Ry. Co. v. Barker* (Ill.), 190.
- Presumption of negligence, plaintiff was not precluded by his allegations of negligence from relying upon. *Chicago City Ry. Co. v. Barker* (Ill.), 190.
- Questions for jury whether operation of train was negligent when speed was from 60 to 65 miles an hour, and statutory signals were not given, at crossing where view was obstructed. *Golinvaux v. Burlington, C. R. & N. R. Co.* (Iowa), 185.
- Right of trainmen to presume that person driving towards tracks will avoid danger. *Lambert v. Southern Pac. R. Co.* (Cal.), 575.
- Right of way between street car and other vehicle. *Lightfoot v. Winnebago Traction Co.* (Wis.), 1.

CROSSINGS—Continued.**Signals.**

- Absence of was cause of accident. *Brusseau v. New York, N. H. & H. R. Co. (Mass.)*, 157.
- Application of Iowa statute to street crossings. *Golinvaux v. Burlington, C. R. & N. R. Co. (Iowa)*, 185.
- Comparative weight of affirmative and negative testimony. *Indiana, I. & I. P. Co. v. Otstot (Ill.)*, 149.
- Duty to give is not owed to persons at other places along track. *Texas & P. Ry. Co. v. Shoemaker (Tex.)*, 594.
- Failure of persons nearby to hear signals was competent for the consideration of the jury. *McDonald v. New York Cent. & H. R. R. Co. (Mass.)*, 125.
- Failure to give was not proximate cause where sectionman was injured in attempting to remove hand car from track to prevent collision with train, where presence of hand car was due to section foreman's negligence in running it on train's time. *Illinois Cent. R. Co. v. McIntosh (Ky.)*, 738.
- Knowledge of approach of train from other sources, effect of failure to give signals. *Lambert v. Southern Pac. R. Co. (Cal.)*, 575.
- Presumption of negligence from failure to give signals and killing of person at crossing, under Mass. statute. *McDonald v. New York Cent. & H. R. R. Co. (Mass.)*, 125.
- Private crossings, application of statute. *Nichols v. Chicago, etc., Ry. Co. (Iowa)*, 766.
- Private crossings, failure to give not negligence per se at common law. *Nichols v. Chicago, etc., Ry. Co. (Iowa)*, 766.
- Question for jury where testimony as to failure to give. *McDonald v. New York Cent. & H. R. R. Co. (Mass.)*, 125.
- Statute requiring applicable where sectionman on hand car was injured. *Illinois Cent. R. Co. v. McIntosh (Ky.)*, 738.

Speed.

- Evidence that engineer of deceased's train was running it at the time of the accident in violation of ordinance limiting speed was inadmissible, in action against other company for killing fireman in a collision at the intersection of two railroads, as the negligence of such engineer could not prevent recovery. *Chicago & A. R. Co. v. Vipond (Ill.)*, 295.

Stop, Look, and Listen.

- Care required at crossing where view is obstructed. *Golinvaux v. Burlington, C. R. & N. R. Co. (Iowa)*, 185.
- Care required of one about to drive over street car tracks. *Goldmann v. Milwaukee Electric Ry. & L. Co. (Wis.)*, 582.
- Contributory negligence in stepping from behind street car, upon other track without looking for cars. *Giardina v. St. Louis & M. R. Ry. Co. (Mo.)*, 579.
- Credibility of plaintiff's testimony a question for jury. *Chicago City Ry. Co. v. Barker (Ill.)*, 190.
- Failure of person, after alighting from street car to look for car on other track and failure to comply with rules of the company to prevent collisions between cars and requiring crossing signals to be given, where it did not appear that such rules were customarily observed, or that plaintiff relied upon or knew of them. *Birmingham Ry. Light & Power Co. v. Oldham (Ala.)*, 165.
- Failure to look for street car, which could have been seen, and mere negligence of those operating car. *Birmingham Ry. L. & P. Co. v. Oldham (Ala.)*, 165.
- Failure to stop and look not negligence per se. *Chicago City Ry. Co. v. Barker (Ill.)*, 190.
- Gate, effect of failure to lower on duty to look for trains. *Van Riper v. New York, S. & W. R. Co. (N. J.)*, 162.

CROSSINGS—Continued.

Licensee was not guilty of contributory negligence in failing to look again before crossing track in alley, though view was somewhat obstructed. *Booth v. Union Terminal Ry. Co.* (Iowa), 768.

Plaintiff was not guilty of contributory negligence, as a matter of law, in failing to alight from his buggy, and to go to a point sufficiently near the track to enable him to see beyond the point where his vision was obstructed by cars, where there was evidence of failure to give signals. *Louisville & N. R. Co. v. Bryant* (Ala.), 734.

Street railway crossings. *Lightfoot v. Winnebago Traction Co.* (Wis.), 1.

Variance where declaration alleged that while plaintiff was driving over defendant's crossing, an engine struck his vehicle, whereby plaintiff was thrown out and injured, and the evidence tended to prove that a car struck the vehicle, but that he was not then thrown out but that the horse ran away and he was thrown out and injured. *Wabash R. Co. v. Billings* (Ill.), 203.

Where his vehicle was struck by engine, causing his horse to run away, the striking of the vehicle was the proximate cause of plaintiff's injuries due to his subsequent fall from vehicle, when it was overturned in a gutter. *Denison B. & N. O. R. Co. v. Barry* (Tex.), 201.

CROWDED STREETS.

See STREET RAILWAYS.

CUSTOM AND USAGE.

See CARRIERS OF PASSENGERS.

DAMAGES.

See APPEAL; CARRIERS OF GOODS; CARRIERS OF PASSENGERS; EMINENT DOMAIN; INJURIES TO PROPERTY; MASTER AND SERVANT; MONOPOLIES; NEGLIGENCE; SPURS AND SIDE TRACKS; TRIAL; WATER AND WATERCOURSES.

Erroneous instruction as to proper method by which jurors may agree upon a verdict. *Indiana, I. & I. R. Co. v. Otstot* (Ill.), 149.

DANGER TO CHILDREN.

See INJURIES TO PROPERTY.

DEATH BY WRONGFUL ACT.

See CARRIERS OF PASSENGERS; EMPLOYER'S LIABILITY ACTS; STREET RAILWAYS.

Contributory Negligence.

Burden of proof. *Mobile, J. & K. C. R. Co. v. Bromberg* (Ala.), 823.

No presumption that person killed on railroad track was guilty of. *Texas & P. Ry. Co. v. Shoemaker* (Tex.), 594.

Verdict should have been directed for defendant. *Chicago City Ry. Co. v. Barker* (Ill.), 190.

Direction of verdict. *Mobile J. & K. C. R. Co. v. Bromberg* (Ala.), 823.

Right of action, under Alabama statute. *Mobile J. & K. C. R. Co. v. Bromberg* (Ala.), 823.

DECLARATIONS.

See WITNESSES.

DEEDS.

See RIGHT OF WAY.

DEFECTIVE CARS.

See FELLOW SERVANTS.

DEFECTS.

See MASTER AND SERVANT.

DEGREE OF CARE.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

DELAY.

See CARRIERS OF GOODS.

DELAY IN CONSTRUCTION.

See RIGHT OF WAY.

DELIVERY.

See BAGGAGE.

DEMURRAGE.

See CARRIERS OF GOODS.

DERAILMENT.

See EVIDENCE; MASTER AND SERVANT.

DESIGNATING NEGLIGENT EMPLOYEE.

See MASTER AND SERVANT.

DIFFERENT DEPARTMENT LIMITATION.

See FELLOW SERVANTS.

DIMINUTION OF DAMAGES.

See PERSONAL INJURIES.

DIRECTION OF VERDICT.

See STOCK, INJURIES TO.

DIRECTIONS.

See MASTER AND SERVANT.

DISCOVERED PERIL.

See CHILDREN; CONTRIBUTORY NEGLIGENCE; CROSSINGS.

DISCRIMINATION.

See CARRIERS OF GOODS.

DISEASE.

See PERSONAL INJURIES.

DOGS.

See ANIMALS.

DRAINAGE.

See WATER AND WATERCOURSES.

DRAINS.

See BRIDGES.

DRINKING WATER.

See MASTER AND SERVANT.

DRUNKENNESS.

See CONTRIBUTORY NEGLIGENCE.

DUE PROCESS OF LAW.

See RAILROADS IN STREETS.

DUMPS.

See WATER AND WATERCOURSES.

DUPLICITY.

See MASTER AND SERVANT.

DUTY TO MAINTAIN.

See CROSSINGS.

DUTY TO PROTECT AGAINST STRANGERS.

See CARRIERS OF PASSENGERS.

DUTY TO WARN.

See CARRIERS OF PASSENGERS.

DUTY TO WARN AND INSTRUCT.

See FELLOW SERVANTS.

DUTY TO INSTRUCT AND WARN.

See MASTER AND SERVANT.

DYNAMITE.

See FELLOW SERVANTS.

EARNING CAPACITY.

See PERSONAL INJURIES.

EASEMENTS.

See EMINENT DOMAIN.

EXCESSIVE VERDICT.

See APPEAL.

EGRESS AND INGRESS.

See EMINENT DOMAIN; RAILROADS IN STREETS.

EJECTION.

See TRESPASSERS.

ELECTRIC RAILWAYS.

See LIENS.

ELECTRIC SHOCKS.

See CARRIERS OF PASSENGERS; CROSSINGS.

ELECTRIC WIRES.

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EMERGENCIES.

See ACCIDENTS ON TRACK.

EMINENT DOMAIN.

See INJURIES TO PROPERTY; RAILROADS IN STREETS;
RIGHT OF WAY.

Appeal from award, where railroad right of way was condemned for telegraph line, was authorized by Georgia statute. *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co. (Ga.)*, 643.

Condemnation of certain land of another railroad company for the purpose of laying an additional track, to be operated, in conjunction with the existing track, as a double-track railroad, did not violate Ill. Const. 1870, art. 11, § 11, forbidding a railroad from

EMINENT DOMAIN—Continued.

- owning a parallel or competing line. *Chicago, etc., R. Co. v. Chicago, etc., Ry. Co. (Ill.)*, 722.
- Consolidation of railroad companies, effect of on right to appeal from award. *Union Traction Co. v. Basey (Ind.)*, 455.

Damages.

- Annoyances and inconveniences to railroad company whose right of way is condemned for telegraph line. *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co. (Ga.)*, 643.
- Benefit railroad company may derive from contract with another telegraph company already occupying its right of way not an element of damages where railroad right of way is condemned for telegraph line. *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co. (Ga.)*, 643.
- Elements of damages to abutting property where alley in city is appropriated and deep excavation is made therein close to lot line. *Kansas City Northwestern R. Co. v. Schwake (Kan.)*, 52.
- Injury caused to a country place owned by plaintiff by the fact that railroad runs between it and a city is general, and not special. *Little Rock, etc., R. Co. v. Newman (Ark.)*, 448.
- Instruction was erroneous because railroad was not liable to damages caused by the improper cutting of certain embankment, without regard to its intention to restore it. *Guinn v. Iowa & St. L. R. Co. (Iowa)*, 710.
- Measure and elements of damages to land taken and not taken. *Louisiana Ry. & Navigation Co. v. Jones (La.)*, 684.
- Measure of damages where railroad right of way is condemned for telegraph line. *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co. (Ga.)*, 643.
- Peculiar benefits to telegraph company from its use of railroad's right of way cannot be considered when assessing damages, where railroad right of way is condemned for telegraph line. *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co. (Ga.)*, 643.
- Remote or speculative damages which cannot be recovered, where railroad right of way is condemned for telegraph line. *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co. (Ga.)*, 643.
- Voluntary payment, what is, so as estop railroad from appealing from award. *Union Traction Co. v. Basey (Ind.)*, 455.

Evidence.

- Evidence as to ease with which material for the restoration of a certain embankment could be obtained was inadmissible. *Guinn v. Iowa & St. L. R. Co. (Iowa)*, 710.
- Evidence that it was not proper to cut an embankment in a certain manner, thereby causing an overflow, was admissible. *Guinn v. Iowa & St. L. R. Co. (Iowa)*, 710.
- Question whether the cutting of certain ditches was necessary for the construction of the roadbed was a proper subject for expert testimony. *Guinn v. Iowa & St. L. R. Co. (Iowa)*, 710.
- Exclusive right of occupancy acquired by telegraph company where railroad right of way is condemned for purposes of its line. *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co. (Ga.)*, 643.
- Extent of easement acquired where railroad right of way is condemned for purposes of telegraph line. *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co. (Ga.)*, 643.
- In proceedings to condemn land of another railroad company, the question whether the strip sought to be taken is necessary for the present or immediate future uses of the company owning it, for railroad purposes, so as not to be subject to condemnation, is one of fact. *Chicago, etc., R. Co. v. Chicago, etc., Ry. Co. (Ill.)*, 722.
- Land of another railroad, sought to be condemned, was not nec-

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- essary for the railroad purposes of the former company. *Chicago, etc., R. Co. v. Chicago, etc., Ry. Co.* (Ill.), 722.
- Lateral support, abutter does not suffer damages recoverable at law for its impairment until the earth is so much disturbed that it slides or falls. *Kansas City Northwestern R. Co. v. Schwake* (Kan.), 52.
- Liability for injuries to tenant's property, caused by destruction of building on land condemned for railroad purposes. *Lyons v. Philadelphia & R. Ry. Co.* (Pa.), 681.
- Police power not limitation of power of eminent domain. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.
- Presumption of validity of proceedings from lapse of time. *Roberts v. Sioux City & P. R. Co.* (Neb.), 32.
- Railroad company cannot condemn longitudinally the right of way of another railroad company of the width of 100 feet, authorized by a certain statute, but may condemn a strip adjoining the statutory right of way. *Chicago, etc., R. Co. v. Chicago, etc., Ry. Co.* (Ill.), 722.
- Railroad company which purchased from another company a right of way 25 feet in width, on which a railroad track was constructed, has the power to locate an additional track on land adjacent to the right of way, and may for that purpose condemn an additional strip. *Chicago, etc., R. Co. v. Chicago, etc., Ry. Co.* (Ill.), 722.
- Right to condemn land of another railroad company. *Chicago, etc., R. Co. v. Chicago, etc., Ry. Co.* (Ill.), 722.
- Telegraph company acquires only an easement in the right of way of a railroad company condemned for the purposes of a telegraph line. *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co.* (Ga.), 643.

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- Application, pleading. *Chicago, I. & L. Ry. Co. v. Barnes* (Ind.), 531.
- Assumption of risk no defense under federal automatic coupler act. *Mobile J. & K. C. R. Co. v. Bromberg* (Ala.), 823.
- Federal statute applicable where injury occurs in making up of train for the purpose of moving interstate commerce. *Mobile, J. & K. C. R. Co. v. Bromberg* (Ala.), 823.
- Foreign car used as passage way between car and freight depot was a part of master's "ways, works or machinery," under Massachusetts statute. *Foster v. New York, N. H. & H. R. Co.* (Mass.), 343.
- Judicial notice of provisions of federal automatic coupler act. *Mobile J. & K. C. R. Co. v. Bromberg* (Ala.), 823.
- Prima facie case, in action for death of brakeman from violation of federal automatic coupler act. *Mobile J. & K. C. R. Co. v. Bromberg* (Ala.), 823.

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Relation between railroad company and injured person, and rules of evidence, not changed by Iowa Code, § 2071. *Chicago & N. W. Ry. Co. v. O'Brien* (C. C. A.), 227.

Right to recover for death of employee caused by violation of federal automatic coupler act, under Alabama statute. *Mobile J. & K. C. R. Co. v. Bromberg* (Ala.), 823.

Section foreman in charge of hands transferring freight was a person entrusted with superintendence over them, within Massachusetts statute. *Murphy v. New York, etc., R. Co.* (Mass.), 346.

Street railway not a railroad, within statute of Iowa abrogating fellow-servant rule as to certain railroad employees. *McLeod v. Chicago & N. W. Ry. Co.* (Iowa), 715.

Under Virginia statute, brakeman's mere knowledge of existence of overhead bridge, by which he was killed, could not defeat recovery for his death. *Hedrick v. Southern Ry. Co.* (N. Car.), 318.

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Complaints of pain, when, and when not, admissible. *Atlanta, etc., Ry. Co. v. Gardner* (Ga.), 602.

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Process for lifting electric wire from one insulator pin to another a matter of common knowledge. *Meehan v. Holyoke St. Ry. Co.* (Mass.), 331.

Speed of train, whether dangerous at place of derailment. *Northern Ala. Ry. Co. v. Shea* (Ala.), 514.

Hearsay Testimony.

Statements made to witness by stranger, in action for injuries to trespasser. *Dixon v. Northern Pac. Ry. Co.* (Wash.), 619.

On issue whether red light was shown on one of parallel tracks, at the intersection of two railroads, evidence that it was shown on the adjacent track was admissible. *Chicago & A. R. Co. v. Vipond* (Ill.), 295.

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As to whether track, where train was derailed, was in an unsafe condition. *Northern Ala. Ry. Co. v. Shea* (Ala.), 514.

Testimony as to condition of semaphore at intersection of two railroads was not a mere conclusion of the witness. *Chicago & A. R. Co. v. Vipond* (Ill.), 295.

Photographs, discretion of trial court. *Stone v. Lewiston, B. & B. St. Ry. (Me.)*, 240.

Proper to submit defendant's theory of case although supported by testimony of but one witness. *Christy v. Des Moines City Ry. Co.* (Iowa), 42.

Res Gestæ.

Statements of injured trespasser kicked from train. *Dixon v. Northern Pac. Ry. Co.* (Wash.), 619.

Similar accidents. *Mobile & O. R. Co. v. Vallowe* (Ill.), 543.

Similar acts by others, done with safety, as bearing on question of contributory negligence. *Mobile J. & K. C. R. Co. v. Bromberg* (Ala.), 823.

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Subsequent precautions. *Choctaw, etc., R. Co. v. McDade* (U. S.), 837.

Testimony of witness as to height of ordinary wagon used in the city was admissible, in action for injuries sustained by plaintiff in a collision between his wagon and a street car, after he had been driving behind an unknown wagon. *Lightfoot v. Winnebago Traction Co.* (Wis.), 1.

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Conductor, and car starter sending out defective car. *Shaw v. Manchester St. Ry.* (N. H.), 275.

Conductor a vice principal with respect to brakeman of his train engaged in making coupling. *Alabama Great Southern R. Co. v. Baldwin* (Tenn.), 9.

Conductor of street car was not shown to be vice principal as to motorman, injured in a collision between such car and a train. *McLeod v. Chicago & N. W. Ry. Co.* (Iowa), 715.

Conductor of train a vice principal. *Alabama Great Southern R. Co. v. Baldwin* (Tenn.), 9.

Contractor was not fellow servant of hands under his control, "subject to the direction and acceptance of the engineer." *Hooe v. Boston & N. St. Ry. Co.* (Mass.), 288.

Different departments, question for jury where section hand was injured through negligence of engineer. *Indiana, I. & I. R. Co. v. Otstot* (Ill.), 149.

Effect of negligence of fellow servant on right to recover against other company for death of fireman killed in a collision at the intersection of two railroads. *Chicago & A. R. Co. v. Vipond* (Ill.), 295.

Employee engaged in charging holes in rock with dynamite fellow servant of employees drilling holes. *Hooe v. Boston & N. St. Ry. Co.* (Mass.), 288.

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Failure to properly set switch, by reason of which an engineer was injured, was the failure to provide a safe track, a nonassignable duty. *Richey v. Southern Ry. Co. (S. Car.)*, 526.

Railroad employees delivering cars on side track of coke company were fellow servants of employees of coke company charged with duty of shifting such cars. *Laporte v. Pittsburgh & L. E. R. Co. (Pa.)*, 290.

Shipper's employee was a passenger, so that negligence of engineer of train was not that of a fellow servant. *Holmes v. Birmingham Southern R. Co. (Ala.)*, 815.

Substitute train dispatcher, in starting train, was vice principal of car coupler killed by it. *McHugh v. Manhattan Ry. Co. (N. Y.)*, 284.

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Under Michigan statute, sufficiency of cattleguard of a kind prescribed by railroad commissioner, and which is in good condition, cannot be questioned. *Clement v. Pere Marquette R. Co. (Mich.)*, 212.

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Presumption of negligence. *Dyer v. Maine Cent. R. Co. (Me.)*, 757.

Subrogation of insurer. *Dyer v. Maine Cent. R. Co. (Me.)*, 757.

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Care required of those in charge of street cars in approaching team apparently restive. *O'Brien v. Blue Hill St. Ry. Co. (Mass.)*, 806.

Insufficiency of evidence of negligence of persons in charge of street car. *Little v. Southern Ry. Co. (Ga.)*, 809.

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Georgia statute imposing upon connecting carriers the duty to trace lost freight, as a condition precedent to the power of a carrier to limit its liability to its own line, is, when applied to an interstate shipment, a violation of interstate commerce clause of federal constitution. *Central of Georgia Ry. Co. v. Murphey & Hunt*, (U. S.), 362.

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Authority to impose occupation tax on railroads, though it is for a failure to transact business, as provided by Virginia Code 1887, § 1200, in addition to its common-law liability, amenable, under section 1201, to a fine. *Norfolk & W. Ry. Co. v. Suffolk (Va.)*, 440.

Limitations may be pleaded to action to enforce payment of license fees by street railways, under New Jersey statute. *Mayor & Aldermen v. Jersey City & B. R. Co. (N. J.)*, 61.

Section of town charter, providing for an occupation tax, as applied to the business of a railroad company, not in conflict with constitutional and statutory provisions, permitting the legislature to impose license on any business which cannot be reached by ad valorem system. *Norfolk & W. Ry. Co. v. Suffolk (Va.)*, 440.

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Mechanic's lien, effect of conveyance to railroad company on right to enforce. *Bates Mach. Co. v. Trenton & N. B. R. Co. (N. J.)*, 656.

Production and control of electric power and its adaptation for use of trolley system a "manufacturing purpose." *Bates Mach. Co. v. Trenton & N. B. R. Co. (N. J.)*, 656.

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Liability of railroad property, not subject to sale on execution, and necessary to the operation of the road, application of California statute. *Southern California Ry. Co. v. Workman (Cal.)*, 444.

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Arrest and malicious prosecution of alleged thief by ticket agent and cashier in railroad office, liability of master. *Daniel v. Atlantic Coast Line R. Co.* (N. Car.), 334.

Assault, allegation that it was within scope of servant's authority was a legal conclusion. *Waller v. Great Northern Ry. Co.* (S. Dak.), 819.

Assault, liability of master depends upon whether act was within scope of servant's employment. *Waller v. Great Northern Ry. Co.* (S. Dak.), 819.

Assault upon servant of owner of land upon which company was building snow fence without authority, was not within scope of authority of railroad employee directed to build fence. *Waller v. Great Northern Ry. Co.* (S. Dak.), 819.

Assumption of Risk.

Complaint must allege that switchman was ignorant of alleged defective construction of track which caused his death. *Chicago, I. & L. Ry. Co. v. Barnes* (Ind.), 531.

Conductor voluntarily assisting in reassembling sections of train assumed the risk of sudden movements of the cars without warning, unless he did not know and appreciate the danger from such cause. *Murphy v. Grand Trunk Ry. Co.* (N. H.), 521.

Conductor with notice of failure to provide sufficient number of cars. *Shaw v. Manchester St. Ry.* (N. H.), 275.

Conflicting evidence as to previous knowledge of existence of structure near track. *Mobile & O. R. Co. v. Vallowe* (Ill.), 543.

Defective appliances. *Choctaw, etc., R. Co. v. McDade* (U. S.), 837.

Electric lineman injured by recoil of cable. *Meehan v. Holyoke St. Ry. Co.* (Mass.), 331.

Employee thrown from hand car by reason of a defect, the risk of which he had assumed, and run over by reason of failure to repair another defect, according to promise. *Foster v. Chicago, etc., Ry. Co.* (Iowa), 538.

Engineer injured by reason of ignition of fuses, which he knew were being carried loose in a box in engine cab. *Crane v. Chicago, etc., R. Co.* (Iowa), 842.

Fall of section hand from hand car, upon which he was riding

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- with knowledge of its defects, of which he had not complained. *Foster v. Chicago, etc., Ry. Co. (Iowa)*, 538.
- Hand transferring freight injured by reason of slipping of "brow" used in such operation. *Murphy v. New York, etc., R. Co. (Mass.)*, 346.
- Negligent directions of foreman. *Kansas City, M. & B. R. Co. v. Thornhill (Ala.)*, 851.
- Presumption on part of servant engaged in transferring freight that platform between cars was properly placed. *Murphy v. New York, etc., R. Co. (Mass.)*, 346.
- Presumption was that conductor, when injured while assisting in reassembling section of train, which had broken into parts by reason of defective coupler, knew of the defect when he ordered it to be again used, because it was his duty to ascertain the cause of an accident, unless the defect could not have been discovered by the exercise of ordinary care. *Murphy v. Grand Trunk Ry. Co. (N. H.)*, 521.
- Reliance on promise to repair brake on hand car. *Foster v. Chicago, etc., Ry. Co. (Iowa)*, 538.
- Sectionman injured in attempting to prevent collision of his hand car with train, induced by his foreman's going forward from a station on the train's time, instead of waiting there for it to pass. *Illinois Cent. R. Co. v. McIntosh (Ky.)*, 738.
- Structures near track. *Mobile & O. R. Co. v. Vallowe (Ill.)*, 543.
- Trainmen do not assume risks of defective track conditions. *Northern Ala. Ry. Co. v. Shea (Ala.)*, 514.
- Using appliance with knowledge of defect. *Crane v. Chicago, etc., R. Co. (Iowa)*, 842.
- Brakeman could not recover for injury sustained while in cab of the locomotive of another train to secure a drink of water. *Shadoan's Adm'r v. Cincinnati, N. O. & T. P. R. Co. (Ky.)*, 280.
- Contributory Negligence.**
 - Although such cars were not in common use, brakeman injured by fall from car, could not recover, as there was no emergency requiring him to run near the edge of its roof, instead of on the running board. *Benson v. New York, etc., R. Co. (R. I.)*, 324.
 - Care required of brakeman to avoid collision with overhead bridge. *Hedrick v. Southern Ry. Co. (N. Car.)*, 318.
 - Care required of conductor, for his own protection, after a coupling had broken, to discover the cause of the accident. *Murphy v. Grand Trunk Ry. Co. (N. H.)*, 521.
 - Complaint did not show contributory negligence on part of section hand in attempting to obey order of foreman to remove hand car from track, a few yards in front of approaching engine. *Kansas City, M. & B. R. Co. v. Thornhill (Ala.)*, 851.
 - Duty of employee unloading freight not to expose himself to unusual danger. *Foster v. New York, N. H. & H. R. Co. (Mass.)*, 343.
 - Employee required to go between cars to make coupling not guilty of contributory negligence in going in on the more dangerous side. *Mobile J. & K. C. R. Co. v. Bromberg (Ala.)*, 823.
 - Evidence that another person had made a coupling in safety on the curve in question by going between cars on the inside of the curve was admissible. *Mobile J. & K. C. R. Co. v. Bromberg (Ala.)*, 823.
 - Failure of engineer, knowing that fuses were being carried loose in box in engine cab, to take precautions to prevent their ignition. *Crane v. Chicago, etc., R. Co. (Iowa)*, 842.
 - Failure of railroad employee unloading freight to see hole in car floor. *Foster v. New York, N. H. & H. R. Co. (Mass.)*, 343.
 - Failure to watch approaching train while attempting to obey order of foreman to remove hand car from in front of it. *Kansas City, M. & B. R. Co. v. Thornhill (Ala.)*, 851.

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- In action for injury to section hand, sustained while attempting to obey foreman's order to remove hand car from in front of approaching train, an instruction, that if, by the negligence of defendant, plaintiff was suddenly placed in a position of extreme peril, and thereupon performed an act, which under the circumstances known to him might seem proper, but which to those knowing all the facts and having time to consider them was not the best, he was not guilty of contributory negligence, was not applicable to the facts. *Kansas City, M. & B. R. Co. v. Thornhill (Ala.)*, 851.
- Motion to exclude all evidence not proper proceeding where plaintiff's evidence makes out prima facie case against master, but it is alleged that it also establishes contributory negligence. *Mobile, J. & K. C. R. Co. v. Bromberg (Ala.)*, 823.
- Obedient dangerous order. *Kansas City, M. & B. R. Co. v. Thornhill (Ala.)*, 851.
- Question for jury where section hand was injured while attempting to obey order of foreman to remove hand car from in front of approaching train. *Kansas City, M. & B. R. Co. v. Thornhill (Ala.)*, 851.
- Question for jury where section hand was struck by engine while at work between rails. *Indiana, I. & I. R. Co. v. Otsot (Ill.)*, 149.
- Question for jury where sectionman was injured while removing hand car from track to prevent collision with train. *Illinois Cent. R. Co. v. McIntosh (Ky.)*, 738.
- Section hand losing his balance and jumping from, and in front of, defective hand car, question for jury. *Foster v. Chicago, etc., Ry. Co. (Iowa)*, 538.
- Violation of, or directing or sanctioning violation of, penal statute or ordinance. *Little v. Southern Ry. Co. (Ga.)*, 809.
- Degree of care required of master in inspecting appliances. *Illinois Cent. R. Co. v. Coughlin (C. C. A.)*, 326.
- Duty to furnish safe appliances. *Crane v. Chicago, etc., R. Co. (Iowa)*, 842.
- Duty to keep roadbed and appliances in proper and safe condition. *Richey v. Southern Ry. Co. (S. Car.)*, 526.
- Duty to warn servant as to hidden dangers from use of certain appliances. *Crane v. Chicago, etc., R. Co. (Iowa)*, 842.
- Evidence.**
- Absence of similar accidents from structure near track. *Mobile & O. R. Co. v. Vallowe (Ill.)*, 543.
- Reconstruction of overhead waterspout by which brakeman was killed. *Choctaw, etc., R. Co. v. McDade (U. S.)*, 837.
- Evidence that ties were rotten at place of derailment amounted to proof of allegation that the rails were "insecurely fastened to the cross-ties." *Northern Ala. Ry. Co. v. Shea (Ala.)*, 514.
- In action for death of employee, complaint need not allege that a certain act or line of conduct was a duty imposed on defendant by law. *Chicago, I. & L. Ry. Co. v. Barnes (Ind.)*, 531.
- In action for injuries to engineer, where the negligence alleged was that of the master and the conductor, there could be no recovery on proof of the negligence of servants other than the conductor. *Richey v. Southern Ry. Co. (S. Car.)*, 526.
- Incompetency of conductor, insufficiency of evidence in action for injury to motorman. *McLeod v. Chicago & N. W. Ry. Co. (Iowa)*, 715.
- Injury to electric lineman from recoil of cable, rule that where danger is obvious master is not bound to instruct servant was applicable. *Meehan v. Holyoke St. Ry. Co. (Mass.)*, 331.
- Inspection, latent defects. *Illinois Cent. R. Co. v. Coughlin (C. C. A.)*, 326.
- Instruction that it is the duty of a railroad to keep its roadbed and

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- appliances in proper and safe condition for the safety of its employees is proper. *Richey v. Southern Ry. Co.* (S. Car.), 526.
- Killing of car coupler, time when and manner in which accident happened through alleged negligence in starting a train was a question for jury. *McHugh v. Manhattan Ry. Co.* (N. Y.), 284.
- Liability for injury sustained by servant while not discharging a duty. *Shadoan's Adm'r v. Cincinnati, N. O. & T. P. R. Co.* (Ky.), 280.
- Liability for unauthorized act of servant, done with intent to benefit master. *Daniel v. Atlantic Coast Line R. Co.* (N. Car.), 334.
- Liability of master for defects in instrumentalities put to temporary use. *Foster v. New York, N. H. & H. R. Co.* (Mass.), 343.
- Negligence, a question for jury where hand transferring freight was injured by reason of command of foreman not to adjust "brow" used in such operation. *Murphy v. New York, etc., R. Co.* (Mass.), 346.
- Negligence a question for jury where section hand was struck by engine while at work between rails. *Indiana, I. & I. R. Co. v. Otstot* (Ill.), 149.
- Negligence in failing to warn fireman of an obstructing car was a question for jury. *Crane v. Chicago, etc., R. Co.* (Iowa), 842.
- Negligence in maintaining waterspout in such position as to be dangerous to brakeman on top of trains. *Choctaw, etc., R. Co. v. McDade* (U. S.), 837.
- Negligence in permitting carriage of loose fuses in box in engine cab, which ignited and injured engineer. *Crane v. Chicago, etc., R. Co.* (Iowa), 842.
- Nonassignable duty, duty to warn servant. *Rogers v. Cleveland, etc., Ry. Co.* (Ill.), 846.
- Pleading, plea setting up both assumption of risk and contributory negligence was bad for duplicity. *Kansas City, M. & B. R. Co. v. Thornhill* (Ala.), 851.
- Presumption of negligence does not arise from fact that employee is killed in a wreck caused by derailment. *Chicago & N. W. Ry. Co. v. O'Brien* (C. C. A.), 227.
- Presumption that master will not furnish defective appliances. *Foster v. New York, N. H. & H. R. Co.* (Mass.), 343.
- Proximate cause of injury to sectionman, sustained in attempting to remove hand car from track to prevent collision with train, which had not given the crossing signals, where presence of hand car was due to negligence of section foreman in running it on train's time. *Illinois Cent. R. Co. v. McIntosh* (Ky.), 738.
- Proximate cause where sectionman was strained while attempting to remove hand car from track to prevent collision with train, from which it was alleged, crossing signals were not given. *Illinois Cent. R. Co. v. McIntosh* (Ky.), 738.
- Question for jury, in action for injury to sectionman, whether foreman was guilty of gross negligence in running hand car on train's time. *Illinois Cent. R. Co. v. McIntosh* (Ky.), 738.
- Question for jury whether brakeman was killed by collision with overhanging waterspout. *Choctaw, etc., R. Co. v. McDade* (U. S.), 837.
- Question for jury whether foreman's negligence in running hand car on train's time was proximate cause of injury to sectionman. *Illinois Cent. R. Co. v. McIntosh* (Ky.), 738.
- Question whose servant was in charge of semaphore used in common was immaterial, in action for injury to employee of one of the companies, caused by collision at intersection of two railroads. *Chicago & A. R. Co. v. Vipond* (Ill.), 295.

Rules.

For government of employees not obligatory, as such, upon those who do not know them, and to whom they have not been promulgated. *Little v. Southern Ry. Co.* (Ga.), 809.

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- Structures near track, necessary location of coal chute was not negligent, although dangerous to employees riding on side of car. *Mobile & O. R. Co. v. Vallowe* (Ill.), 543.
- Structures near track, railroad not chargeable with negligence in permitting telephone poles to be erected too near its track, by third party, on the land of another. *Chattanooga Electric Ry. Co. v. Moore* (Tenn.), 281.
- Sufficiency of complaint, in action for injury to brakeman, alleging that defect in track was the result of negligence of some person, not named, entrusted with the duty of keeping the track in proper condition. *Northern Ala. Ry. Co. v. Shea* (Ark.), 514.
- Sufficiency of complaint, in action for injury to brakeman, alleging that derailment was caused by negligence of engineer in running train at a dangerous and reckless rate of speed. *Northern Ala. Ry. Co. v. Shea* (Ala.), 514.
- Sufficiency of complaint, in action for injury to brakeman, which did not give full name of alleged negligent employee. *Northern Ala. Ry. Co. v. Shea* (Ala.), 514.
- Sufficiency of evidence of negligence of engineer in running train at an excessive rate of speed. *Northern Ala. Ry. Co. v. Shea* (Ala.), 514.
- Sufficiency of evidence that derailment was caused by defects in track. *Northern Ala. Ry. Co. v. Shea* (Ala.), 514.
- Sufficiency of evidence that master was liable for injuries to section hand thrown from hand car by reason of a defect, the risk from which he had assumed, where it also appeared that he might not have been injured had a defect in the brake been repaired according to a promise made to him. *Foster v. Chicago, etc., Ry. Co.* (Iowa), 538.
- Sufficiency of evidence that section hand would not have been injured if brake had been in repair. *Foster v. Chicago, etc., Ry. Co.* (Iowa), 538.
- Telltails near overhead bridge, proper instruction as to sufficiency of. *Hedrick v. Southern Ry. Co.* (N. Car.), 318.
- Volunteers, care due. *Atlanta & W. P. R. Co. v. West* (Ga.), 548.
- Whether red light was shown was question for jury, in action for injury to employee of one of the companies, caused by collision at intersection of two railroads. *Chicago & A. R. Co. v. Vipond* (Ill.), 295.
- Who Are Employees.**
 - Creation of relation. *Atlanta & W. P. R. Co. v. West* (Ga.), 548.
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Antitrust statutes, construction. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

Association's agreement is not rendered unlawful because some of its members attempt to put it to an unlawful use. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

Association's right to withhold car service for consignee's refusal to recognize it and to pay certain charges. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

Car service association, legality inferred from certain legislative enactments defining trusts and declaring them illegal. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

Car service association, legality of rule under which car service is withheld for failure to pay charges. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

Car service association, tests as to legality of. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

Car service association was not an illegal combination, under Mississippi statute. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

Discrimination in charges when not proof, under Mississippi statute, of illegality of car service association. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

Legality of combinations. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

Police power of state to restrict power of corporations to contract. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

Trust, legality of agreement. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

Trusts, tests as to what are. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

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See ACCIDENTS ON TRACK; CARRIERS OF GOODS; CHILDREN; MASTER AND SERVANT; PERSONAL INJURIES; STOCK, INJURIES TO; STREET RAILWAYS.

Actual participation by defendant, proof of was essential where wantonness and wrongful intention in running train against plaintiff was alleged. *Central of Georgia Ry. Co. v. Freeman* (Ala.), 750.

Doctrine of prior and subsequent negligence not applicable where negligence of plaintiff and defendant are practicably simultaneous. *Butler v. Rockland, etc., St. Ry. (Me.)*, 778.

Duty to avoid consequences of plaintiff's negligence. *Atlanta, etc., Ry. Co. v. Gardner* (Ga.), 602.

Necessity of pleading particulars. *Atlanta, etc., Ry. Co. v. Gardner* (Ga.), 602.

Ordinary care, definition. *Greene v. Louisville Ry. Co. (Ky.)*, 589.

Pleading. *Chicago I. & L. Ry. Co. v. Barnes* (Ind.), 531.

Pleading and proof, instruction. *Mobile, J. & K. C. R. Co. v. Bromberg* (Ala.), 823.

Proof of actual participation by the defendant company was not essential, where complaint alleged that defendant wantonly and intentionally caused or allowed a train to collide with plaintiff's vehicle. *Birmingham Belt R. Co. v. Gerganous* (Ala.), 584.

Question for jury. *Foster v. New York, N. H. & H. R. Co. (Mass.)*, 343. *Holmes v. Birmingham Southern R. Co. (Ala.)*, 815.

Reckless equivalent to willful, in complaint, so as to justify punitive damages. *Pickett v. Southern Ry. Co. (S. Car.)*, 269.

Wantonness in causing death on track was alleged against corporation as distinguished from the wrong of its servant, and was unsustained without evidence that the corporation committed, or actually participated in the commission of the wrongful act averred. *Birmingham S. R. Co. v. Gunn* (Ala.), 745.

Where defendant has been guilty of no breach of any duty owing to plaintiff there can be no legal liability. *Atlanta & W. P. R. Co. v. West* (Ga.), 548.

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

See CROSSINGS; STREET RAILWAYS.

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Causal connection between negligent act and injury cannot be
presumed. *Texas & P. Ry. Co. v. Shoemaker (Tex.)*, 594.

Contributory Negligence.

Diminution of damages, under Georgia statute. *Atlanta, etc.,
Ry. Co. v. Gardner (Ga.)*, 602.

Duty to avoid consequences of defendant's negligence, error to
fail to instruct. *Atlanta, etc., Ry. Co. v. Gardner (Ga.)*, 602.

PERSONAL INJURIES—Continued.

Duty to avoid consequences of defendant's negligence, instructions. *Atlanta, etc., Ry. Co. v. Gardner (Ga.)*, 602.
Whether question involved. *Atlanta, etc., Ry. Co. v. Gardner (Ga.)*, 602.

Damages.

Effect of mistakes of plaintiff's physician. *Chicago City Ry. Co. v. Saxby (Ill.)*, 568.
Instruction erroneous as authorizing an award of an amount less than that claimed, without reference to damages actually sustained. *Kansas City, M. & B. R. Co. v. Thornhill (Ala.)*, 851.
Measure of damages for permanent loss of earning capacity, in absence of evidence of plaintiff's prior earning capacity. *Atlanta, etc., Ry. Co. v. Gardner (Ga.)*, 602.
Verdict of \$2,000 was not excessive, considering age of boy and nature of his injuries. *Cameron v. Duluth-Superior Traction Co. (Minn.)*, 632.

Evidence.

It was error to permit plaintiff to introduce testimony as to what the witnesses had heard about plaintiff's prior injuries. *Chicago City Ry. Co. v. Uhter (Ill.)*, 217.
Mortality tables not admissible in absence of evidence as to value of plaintiff's earning capacity. *Atlanta, etc., Ry. Co. v. Gardner (Ga.)*, 602.
Inherent tendency to disease, question for jury. *Chicago City Ry. Co. v. Saxby (Ill.)*, 568.
Plaintiff's duty to procure medical attendance. *Chicago City Ry. Co. v. Saxby (Ill.)*, 568.
Sufficiency of evidence that plaintiff's knee was injured at the time of the accident, to permit evidence that tuberculosis, which developed in the knee, might have been occasioned by violence. *Chicago City Ry. Co. v. Saxby (Ill.)*, 568.

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See CARRIERS OF PASSENGERS; NEGLIGENCE.

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RAILROAD AID.

Estoppel of subscriber to contend that railroad's agreement to construct extension of road to point beyond state was ultra vires. *Doherty v. Arkansas & O. R. Co.* (Ind. Terr.), 90.
Evidence as to acceptance of proposition and commencement of work was properly admitted, in action on subscription to extension of railroad. *Doherty v. Arkansas & O. R. Co.* (Ind. Terr.), 90.

RAILROAD AID—Continued.

- Evidence as to whether railroad worked on the track after the date for completion was properly excluded, in action on subscription. *Doherty v. Arkansas & O. R. Co. (Ind. Terr.)*, 90.
- Evidence that the first class steel rails laid upon the track were changed, but not showing by whom they were changed, was properly stricken out, in action on subscription. *Doherty v. Arkansas & O. R. Co. (Ind. Terr.)*, 90.
- Right to withdraw subscription, instructions. *Doherty v. Arkansas & O. R. Co. (Ind. Terr.)*, 90.
- Subscription could not be withdrawn. *Doherty v. Arkansas & O. R. Co. (Ind. Terr.)*, 90.
- Substantial compliance with contract entitles company to collect subscription. *Doherty v. Arkansas & O. R. Co. (Ind. Terr.)*, 90.
- Validity of subscription, immaterial whether railroad had any interest in town to which it was proposed to extend road. *Doherty v. Arkansas & O. R. Co. (Ind. Terr.)*, 90.
- Validity of subscription, instructions. *Doherty v. Arkansas & O. R. Co. (Ind. Terr.)*, 90.
- Validity of subscription was not affected by fact that notice of acceptance had not been given. *Doherty v. Arkansas & O. R. Co. (Ind. Terr.)*, 90.

RAILROAD COMMISSIONS.

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RAILROAD PURPOSES.

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RAILROADS.

See EMINENT DOMAIN; INJURIES TO PROPERTY; LIENS; NEGLIGENCE; RIGHT OF WAY.

Consolidated company liable for tort committed by a constituent company before the consolidation, under South Carolina statute. *Pickett v. Southern Ry. Co. (S. Car.)*, 269.

RAILROADS IN STREETS.

See CROSSINGS; EMINENT DOMAIN; INJURIES TO PROPERTY; STREET RAILWAYS.

Conforming tracks to grade, application of Dallas City charter. *Yazoo & M. V. R. Co. v. Searles (Miss.)*, 465.

Damages.

Injury to non-abutting property was not special, but merely general, for which no recovery could be had. *Little Rock, etc., R. Co. v. Newman (Ark.)*, 448.

Lateral support, actionable wrong for impairment is not the excavation made close to lot line, but the act of allowing the owner's land to fall. *Kansas City Northwestern R. Co. v. Schwake (Kan.)*, 52.

Special damages recoverable by abutting owner, what constitutes. *Smith v. Southern Pac. R. Co. (Cal.)*, 457.

Impracticability of complying with ordinance a good defense, in proceedings to compel railroad to reduce its track to grade at certain crossings. *Yazoo & M. V. R. Co. v. Searles (Miss.)*, 465.

Ordinance not invalid because it required road bed at crossings to be reduced to grade. *Yazoo & M. V. R. Co. v. Searles (Miss.)*, 465.

Ordinance requiring tracks at crossings to be reduced to grade is the exercise of police power, and therefore not an ordinance taking property without due process of law. *Yazoo & M. V. R. Co. v. Searles (Miss.)*, 465.

RAILROADS IN STREETS—Continued.

Ordinance requiring track to be reduced to grade at certain crossings a valid exercise of police power. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

Speed of 65 miles an hour as negligence. *Golinvaux v. Burlington, C. R. & N. R. Co.* (Iowa), 185.

Sufficiency of answer to petition for mandamus to compel railroad to reduce its tracks to grade at certain crossings. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

Sufficiency of petition for mandamus to compel railroad to reduce its tracks at certain crossings to grade. *Yazoo & M. V. R. Co. v. Searles* (Miss.), 465.

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RES GESTÆ.

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RESTRAINT OF TRADE.

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RIDING IN DANGEROUS PLACE.

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RIDING ON FRONT PLATFORM.

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RIDING ON STEPS.

See CARRIERS OF PASSENGERS.

RIGHT OF ACTION.

See BAGGAGE.

RIGHT OF WAY.

See EMINENT DOMAIN; LOCAL ASSESSMENTS; STATIONS AND DEPOTS; STREET RAILWAYS.

Clause requiring railroad to be finished within certain time was a covenant, and not a condition, so that noncompliance with it did not work a forfeiture of right of way. *Krueger v. St. Louis St. C. & W. R. Co. (Mo.)*, 459.

Delay in construction of railroad, partially caused by financial panic, was not so unreasonable as to constitute breach of railroad's covenant with vendor to construct line with reasonable speed. *Bell v. Southern Pac. R. Co. (Cal.)*, 687.

Erection of buildings by individual for purposes connected with carrier's business to be regarded as merely permissive, in absence of notice of claim of title or express agreement. *Roberts v. Sioux City & P. R. Co. (Neb.)*, 32.

In action to enforce agreement for sale of railroad right of way, plaintiff's testimony was insufficient to require a finding that a certain representation was a material inducement for the contract. *Bell v. Southern Pac. R. Co. (Cal.)*, 687.

It was not error to find that there was no representation made to plaintiff that the railroad had finally been located on the northern route, or that she intended solely to grant a right of way over such route. *Bell v. Southern Pac. R. Co. (Cal.)*, 687.

Liability for injuries to adjacent property caused by timber being carried from right of way by high water. *Illinois Cent. R. Co. v. Moore (Ky.)*, 56.

Market value of railroad right of way for other uses than that to which it is applied. *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co. (Ga.)*, 643.

Prospective advantages to be considered in determining reasonableness of contract for sale of right of way. *Bell v. Southern Pac. R. Co. (Cal.)*, 687.

Reasonableness of contract for sale of right of way to railroad. *Bell v. Southern Pac. R. Co. (Cal.)*, 687.

Use by individual for purposes connected with carrier's business not adverse, in absence of notice of claim of title. *Roberts v. Sioux City & P. R. Co. (Neb.)*, 32.

Use for agricultural purposes not adverse to railroad company. *Roberts v. Sioux City & P. R. Co. (Neb.)*, 32.

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SECTION HANDS.

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"SHIPSIDE."

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SIDE TRACKS.

See SPURS AND SIDE TRACKS.

SIGNALS.

See ACCIDENTS ON TRACK; CHILDREN; CROSSINGS;
MASTER AND SERVANT; STOCK, INJURIES TO.

SIGNALS WHERE ACCIDENT NOT AT CROSSING.

See CHILDREN.

SIMILAR ACCIDENTS.

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SPECIAL DAMAGES.

See EMINENT DOMAIN; RAILROADS IN STREETS.

SPECIFIC PERFORMANCE.

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SPEED.

See ACCIDENTS ON TRACK; CROSSINGS; EVIDENCE;
RAILROADS IN STREETS; STOCK, INJURIES TO;
STREET RAILWAYS.

SPURS AND SIDE TRACKS.

See CARRIERS OF GOODS.

Elements of damages for breach of contract to build spur track to plaintiff's mill. *Martin v. Seaboard Air Line Ry. (S. Car.)*, 638.

Expenses incurred by plaintiff in making his building suitable for warehouse was sufficient consideration to sustain contract by which railroad agreed to construct side track to such building. *Thomas v. South Haven & E. R. Co. (Mich.)*, 88.

Verbal agreement to lay side track to plaintiff's building if he would remodel it and move it to a certain point was not within statute of frauds of Michigan. *Thomas v. South Haven & E. R. Co. (Mich.)*, 88.

STARTING TRAINS.

See FELLOW SERVANTS.

STATEMENTS OF CONDUCTOR.

See STREET RAILWAYS.

STATIONS AND DEPOTS.

See CARRIERS OF PASSENGERS.

Contributory Negligence.

Of person injured by explosion of naphtha in cars which were burning, while he was walking near railroad yard, was a question for the jury. *Smith v. Pittsburg, etc., Ry. Co. (Pa.)*, 600.
Railroad company was not liable for breach of covenant to maintain a suitable entrance and roadway to its station grounds, where changes were made by subsequently incorporated village. *Lucas v. New York, N. H. & H. R. Co. (C. C. A.)*, 85.

STATUTE OF FRAUDS.

See SPURS AND SIDETRACKS.

STATUTES.

See CARRIERS OF GOODS; MASTER AND SERVANT;
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STATUTORY REGULATIONS.

See CROSSINGS.

STEPS.

See CARRIERS OF PASSENGERS.

STOCK, INJURIES TO.

See ANIMALS; FENCES.

Absence of witnesses, was not error for plaintiff's counsel to refer to. *Airikainen v. Houghton County St. Ry. Co. (Mich.)*, 178.

Care required of trainmen. *Airikainen v. Houghton County St. Ry. Co. (Mich.)*, 178.

Cattleguards, sufficiency of under Mississippi statute. *Yazoo & M. V. R. Co. v. Harrington (Miss.)*, 452.

Cattleguards where tracks pass through enclosed lands, Mississippi statute requiring railroad to construct a valid exercise of police power. *Yazoo & M. V. R. Co. v. Harrington (Miss.)*, 452.

Direction of verdict for defendant was not warranted. *Airikainen v. Houghton County St. Ry. Co. (Mich.)*, 178.

Duty to look out for stock on or near track. *Aarikainen v. Houghton St. Ry. Co. (Mich.)*, 178.

STOCK, INJURIES TO—Continued.

In an action under Mont. Civ. Code, § 950, it is necessary that the petition allege plaintiff's ownership or possession of land along or through which the railroad runs, and that the stock was killed at such place. *Beaudin v. Oregon Short Line R. Co.* (Mont.), 208.

In an action under Mont. Civ. Code, § 950, no allegation of negligence in the operation of the train is necessary. *Beaudin v. Oregon Short Line R. Co.* (Mont.), 208.

Insufficiency of evidence that stock was killed by train. *Beaudin v. Oregon Short Line R. Co.* (Mont.), 208.

It was intent of legislature to adopt certain statutory provision, thereby enacting a law requiring a railroad company, whenever it located a line of road, along or through private property, to fence the side of its line next the property, if laid along the same, or through the property, or, to pay the owner of stock killed, unless accident occurred through the neglect of the owner, where the latter part of the statute had not been complied with. *Beaudin v. Oregon Short Line R. Co.* (Mont.), 208.

Lookout, duty to maintain. *Central of Georgia Ry. Co. v. Sport* (Ala.), 774.

Lookout, instruction not warranted by evidence. *Central of Georgia Ry. Co. v. Sport* (Ala.), 774.

Mont. Civ. Code, § 950, does not require a railroad to be fenced at a station. *Beaudin v. Oregon Short Line R. Co.* (Mont.), 208.

Negligence was question for jury. *Central of Georgia Ry. Co. v. Sport* (Ala.), 774.

Presumption of negligence from accident rebutted. *Central of Georgia Ry. Co. v. Williams Buggy Co.* (Ga.), 171.

Presumption of negligence from accident was rebutted by testimony of trainmen. *Central of Georgia Ry. Co. v. Dich* (Ga.), 200.

Signals, failure to give for public crossing was immaterial where stock was killed at private crossing. *Nichols v. Chicago, etc., Ry. Co.* (Iowa), 766.

Speed, at other points than crossings, not negligence. *Central of Georgia Ry. Co. v. Williams Buggy Co.* (Ga.), 171.

Variance where it was alleged that cattle entered upon track where company had failed to fence, and it appeared that they entered over cattleguards. *Clement v. Pere Marquette R. Co.* (Mich.), 212.

Where the two inner gates between railroad tracks, at a point where three tracks ran through a farm, had been removed by the land owner, and a cow of a third person wandered on the track at such private crossing, the railroad on whose track the cow was thereafter killed was not liable for failure to maintain a gate between its track and the middle track. *Fowbel v. Wabash R. Co.* (Iowa), 169.

STOP, LOOK, AND LISTEN.

See CROSSINGS.

STRANGERS.

See CARRIERS OF PASSENGERS.

STREET CROSSINGS.

See CROSSINGS.

STREET RAILWAYS.

See ACCIDENTS ON TRACK; ANIMALS; CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; EMPLOYERS' LIABILITY ACTS; FRIGHTENING TEAMS; LICENSES; MASTER AND SERVANT; RAILROADS IN STREETS.

Care due from those in charge of street cars to other users of streets. *Greene v. Louisville Ry. Co.* (Ky.), 589.

Care due person driving on track. *Greene v. Louisville Ry. Co.* (Ky.), 589.

STREET RAILWAYS—Continued.

Care required at populous places to avoid collisions with other users of streets, instruction erroneous as invading province of jury. *Indianapolis St. Ry. Co. v. Taylor* (Ind.), 356.

Care required to avoid collisions with other vehicles. *O'Brien v. Blue Hill St. Ry. Co.* (Mass.), 806.

Collision between car and another vehicle, direction of verdict for defendant. *Dunkle v. City Passenger Ry. Co.* (Pa.), 776.

Contributory Negligence.

Driving vehicles, with curtains down at side and rear, upon street car tracks. *Richmond P. & P. Co. v. Allen* (Va.), 566.

Pedestrian struck by car, which he had seen before he attempted to cross track. *Hornstein v. Rhode Island Co.* (R. I.), 401.

Right of way between street car and other vehicle driven along track. *Texas & P. Ry. Co. v. Shoemaker* (Tex.), 594.

Contributory negligence, and negligence, proximate cause. *Butler v. Rockland, etc., St. Ry.* (Me.), 778.

Duty of motorman upon seeing that team is frightened by his car. *Christy v. Des Moines City Ry. Co.* (Iowa), 42.

Duty to avoid injuring other users of streets. *Butler v. Rockland, etc., St. Ry.* (Me.), 778.

Evidence.

Ordinance to prevent accidents, but stating merely general rules of law, properly excluded, in action for injuries sustained in a collision. *Christy v. Des Moines City Ry. Co.* (Iowa), 42.

Testimony of bystander as to remarks of conductor, made after the accident, were inadmissible. *Indianapolis St. Ry. Co. v. Taylor* (Ind.), 356.

Evidence warranted verdict for plaintiff, injured in a collision between his wagon and car. *Kennedy v. Consolidated Traction Co.* (Pa.), 635.

Fact that point where car ran into person crossing track was a populous place was one to be considered by jury as bearing on question of company's negligence. *Indianapolis St. Ry. Co. v. Taylor* (Ind.), 356.

Gross negligence in running car past persons engaged in picking up packages warranted verdict for plaintiff even though he was guilty of contributory negligence. *Rhymes v. Jackson Electric Ry., L. & P. Co.* (Miss.), 7.

Lookouts and speed, care required of those in charge of street cars to avoid injuring other users of streets. *Butler v. Rockland, etc., St. Ry.* (Me.), 778.

Mutual rights and duties of street railways and other users of streets. *O'Brien v. Blue Hill St. Ry. Co.* (Mass.), 806.

Mutual rights and obligations of street railways and other users of streets. *Lightfoot v. Winnebago Traction Co.* (Wis.), 1.

Negligence and contributory negligence, inconsistent instructions in action for injuries sustained in a collision. *Christy v. Des Moines City Ry. Co.* (Iowa), 42.

Negligence and contributory negligence, instruction authorizing recovery for killing person on track, though mere negligence was properly refused. *Feitl v. Chicago City Ry. Co.* (Ill.), 798.

Negligence in running down vehicle on track from behind. *Richmond P. & P. Co. v. Allen* (Va.), 566.

Negligence, sufficiency of evidence of where collision between street car and other vehicle. *Butler v. Rockland, etc., St. Ry.* (Me.), 778.

No right of way exists in favor of one crossing the tracks of a street railway when a diminution of the speed of the car is necessary to enable him to pass in safety. *Goldmann v. Milwaukee Electric Ry. & L. Co.* (Wis.), 582.

Proximate cause where negligence, and also contributory negligence on part of driver of vehicle, with which car collided. *Butler v. Rockland, etc., St. Ry.* (Me.), 778.

STREET RAILWAYS—Continued.

Proximate cause where wire reel, left in untraveled portion of highway by company, was rolled into the street by boys, and caused injury to plaintiff. *Glassey v. Worcester Con. St. Ry. Co. (Mass.)*, 736.

Right of those in charge of cars or trains to assume that other users of streets will be careful to avoid collisions with cars. *Butler v. Rockland, etc., St. Ry. (Me.)*, 778.

Right of way between street car and other vehicle at crossing. *Lightfoot v. Winnebago Traction Co. (Wis.)*, 1.

Willful or wanton injury to person driving on track, insufficiency of evidence. *Feitl v. Chicago City Ry. Co. (Ill.)*, 798.

STREETS AND HIGHWAYS.

See EMINENT DOMAIN; RAILROADS IN STREETS; STREET RAILWAYS.

STRUCTURES NEAR TRACK.

See MASTER AND SERVANT.

SUBROGATION.

See FIRES SET BY LOCOMOTIVES.

SUBSCRIPTIONS.

See RAILROAD AID.

SUBSEQUENT PRECAUTIONS.

See EVIDENCE; MASTER AND SERVANT.

SUBSTITUTES.

See FELLOW SERVANTS.

SUFFERING.

See EVIDENCE.

SUPERINTENDENCE.

See EMPLOYERS' LIABILITY ACTS.

SWITCHING CAR.

See CARRIERS OF GOODS.

TAXATION.

See LICENSES; LOCAL ASSESSMENTS.

Conclusiveness to city officer of assessment of railway property by state board, under Nebraska statutes. *State v. Back (Neb.)*, 99.

Constitutionality of Nebraska statute providing for distribution of value of railroad property among the different taxing districts along the road, on mileage basis. *State v. Back (Neb.)*, 99.

Constitutionality of sections 39, 40, art. 1, c. 77, Neb. Comp. St. 1901. *Chicago, B. & Q. R. R. v. Richardson County (Neb.)*, 665.

Exemptions.

Use for railroad purposes, what was, and what was not. *Grand Rapids & I. Ry. Co. v. Grand Rapids (Mich.)*, 704.

Half of railroad bridge was "part of continuous line" within meaning of Nebraska statute, and, therefore, assessable by state board, and not by local assessors. *Chicago, etc., R. Co. v. Cass County (Neb.)*, 698.

Method of bringing about uniformity of valuation in respect to all property subject to municipal taxation where railway property within city is to be assessed. *State v. Back (Neb.)*, 99.

Of railroad bridges, under Nebraska statute. *Chicago, B. & Q. R. R. v. Richardson County (Neb.)*, 665.

Power of legislature to distribute value of railway property among

TAXATION—Continued.

the different taxing districts on mileage basis. *State v. Back* (Neb.), 99.

Whether certain railroad bridge was "part of the continuous line of road," under Nebraska statute, was a question of law, and not a question of fact upon which an estoppel could be predicated. *Chicago, etc., R. Co. v. Cass County* (Neb.), 698.

TELEGRAPHS AND TELEPHONES.

See EMINENT DOMAIN.

TELEPHONE POLES.

See MASTER AND SERVANT.

TELLTALES.

See MASTER AND SERVANT.

TEMPORARY USE.

See MASTER AND SERVANT.

TENANTS.

See EMINENT DOMAIN.

TERMINATION OF RELATION.

See CARRIERS OF PASSENGERS.

TESTS.

See MONOPOLIES.

THIEVES.

See MASTER AND SERVANT.

THREATS.

See CARRIERS OF PASSENGERS.

TICKET AGENTS.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

TIMBER.

See RIGHT OF WAY.

TORTS.

See MASTER AND SERVANT; RAILROADS.

TRACING FREIGHT.

See INTERSTATE COMMERCE.

TRACKS.

See CARRIERS OF PASSENGERS; CRIMINAL LAW; EVIDENCE; MASTER AND SERVANT.

TRAIN DISPATCHERS.

See FELLOW SERVANTS.

TRANSFERRING.

See CARRIERS OF PASSENGERS.

TRANSFERRING FREIGHT.

See EMPLOYERS' LIABILITY ACTS.

TRESPASSERS.

See ANIMALS; CHILDREN; EVIDENCE.

Ejection.

Authority of brakeman. *Dixon v. Northern Pac. Ry. Co.* (Wash.), 619.

Liability for injuries resulting from wanton, reckless and malicious acts of brakeman. *Dixon v. Northern Pac. Ry. Co.* (Wash.), 619.

TRIAL.

Counsel has no right to advise jury of his intention not to ask for instructions. *Indiana, I. & I. R. Co. v. Otstot* (Ill.), 149.

Harmless error for counsel to reply to court, in presence of jury, by saying we have no instructions to ask. *Indiana, I. & I. R. Co. v. Otstot* (Ill.), 149.

Harmless error in statements as to proper amount of damages. *Chicago & A. R. Co. v. Vipond* (Ill.), 295.

Refusal of court to stop argument of counsel, as to proper amount of verdict, was not reversible error. *Mobile, J. & K. C. R. Co. v. Bromberg* (Ala.), 823.

TROLLEY SYSTEM.

See LIENS.

TRUSTS.

See MONOPOLIES.

TUBERCULOSIS.

See PERSONAL INJURIES.

ULTRA VIRES.

See RAILROAD AID.

UNATTENDED CARS.

See CROSSINGS.

UNIFORMITY.

See TAXATION.

UNLAWFUL USE.

See MONOPOLIES.

UNUSUAL PUNISHMENTS.

See CRIMINAL LAW.

USING SAME STATION.

See CARRIERS OF PASSENGERS.

VALUATION OF FREIGHT.

See CARRIERS OF GOODS.

VARIANCE.

See CROSSINGS; MASTER AND SERVANT; STOCK, INJURIES TO.

VERDICT.

See APPEAL.

VIBRATION.

See INJURIES TO PROPERTY.

VICE PRINCIPALS.

See FELLOW SERVANTS.

VIEW.

See INJURIES TO PROPERTY.

VIOLATION OF PENAL STATUTE.

See MASTER AND SERVANT.

VISION IMPAIRED.

See ACCIDENTS ON TRACK.

VOLUNTARY PAYMENT.

See EMINENT DOMAIN.

VOLUNTEERS.

See CHILDREN; MASTER AND SERVANT.

WAITING FOR PASSENGERS.

See CARRIERS OF PASSENGERS.

WANTONNESS.

See ACCIDENTS ON TRACK; CHILDREN; NEGLIGENCE; TRESPASSERS.

WARNINGS.

See CARRIERS OF PASSENGERS; FELLOW SERVANTS; MASTER AND SERVANT.

WATER AND WATERCOURSES.

See BRIDGES; INJURIES TO PROPERTY; RIGHT OF WAY.

Company, which, in constructing a dump, fails to provide sufficient drainage, is liable for injuries to property which should have been foreseen, but not for fright caused by sickness in the vicinity. *Denison, B. & N. O. R. Co. v. Barry* (Tex.), 201.

WATERSPOUTS.

See MASTER AND SERVANT.

"WAYS, WORKS OR MACHINERY."

See EMPLOYER'S LIABILITY ACTS.

WHIPPING STRAPS.

See MASTER AND SERVANT.

WHO ARE EMPLOYEES.

See MASTER AND SERVANT.

WHO ARE PASSENGERS.

See CARRIERS OF PASSENGERS.

WILLFULNESS.

See CARRIERS OF PASSENGERS; CHILDREN; NEGLIGENCE; STREET RAILWAYS.

WIRES.

See MASTER AND SERVANT.

WITNESSES.

See ACCIDENTS ON TRACK; STOCK, INJURIES TO.

Railroad not obliged to produce trainmen to explain their connection with accident on track. *Texas & P. Ry. Co. v. Shoemaker* (Tex.), 594.

Remarks of counsel as to credibility of railroad employees as witnesses was cause for reversal, notwithstanding instruction of

WITNESSES—Continued.

court and remittitur by plaintiff. *Central of Georgia Ry. Co. v. Dich* (Ga.), 200.

Remarks of counsel as to credibility of railroad employees as witnesses was error. *Denison, B. & N. O. R. Co. v. Barry* (Tex.), 201.

Testimony that engineer, who testified in action for injury to child on track, told witness that when he first saw child he thought it a goat, could be considered only for the purpose of impeaching testimony of engineer. *Nashville, etc., Ry. Co. v. Harris* (Ala.), 562.

WRONGFUL DEATH.

See **DEATH BY WRONGFUL ACT.**

WRONG STATION.

See **CARRIERS OF PASSENGERS.**

YARDS.

See **CHILDREN; MASTER AND SERVANT.**



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